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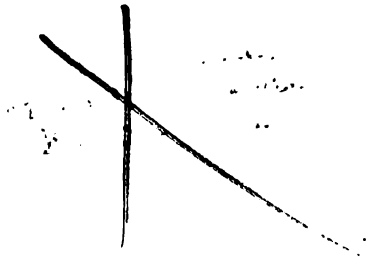

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MASSACHUSETTS REPORTS

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CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JANUARY 1895 — JUNE 1895

GEORGE F. TUCKER

REPORTER

BOSTON

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. WALBRIDGE A. FIELD, CHIEF JUSTICE.
HON. CHARLES ALLEN.
HON. OLIVER WENDELL HOLMES.
HON. MARCUS P. KNOWLTON.
HON. JAMES M. MORTON.
HON. JOHN LATHROP.
HON. JAMES M. BARKER.

ATTORNEY GENERAL.

HON. HOSEA M. KNOWLTON.

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TABLE

OF THE CASES REPORTED.

Abbott *v.* Doane 433
Allen (Di Filippo *v.*) . . . 528
American Protective League (Bell *v.*) 558
Amesbury Board of Health (Huse *v.*) 240
Ashcroft *v.* Simmons . . . 437
Assner (Kaffenburg *v.*) . . . 295
Attorney General *v.* Sullivan . 446
Atwell *v.* Jenkins 362
Austin *v.* Bailey 270

Bailey (Austin *v.*) 270
——— (O'Brien *v.*) 325
Baker *v.* Seavey 522
Barme (Chesebro *v.*) . . . 79
Bartlett, petitioner 509
Beckwith (Merrill *v.*) . . . 503
Bell *v.* American Protective League 558
Bennett (Tufts *v.*) 398
Boland *v.* St. John's Schools . 229
Borden *v.* Mercer 7
——— (Sullivan *v.*) . . . 470
Boston (Harding *v.*) 14
——— (Manson *v.*) 479
Boston & Albany Railroad (Sprow *v.*) 330
Boston & Maine Railroad (Floytrup *v.*) 152
——— (Jones *v.*) 245
——— (McIntyre *v.*) . . . 189
——— (Mears *v.*) 150
——— (Warren *v.*) 484
Boston Electric Co. *v.* Cambridge 64
Boston Towage & Lighterage Co. (Lyons *v.*) 158
Boston Wall Paper Co. *v.* Mullen 20
Bowker (Martin *v.*) 461
Breed (Standard Button Fastening Co. *v.*) 10
Brickett *v.* Downs 70
Brookline (Slocum *v.*) . . . 23
Brownell *v.* Eaton 463
——— *v.* Railroad Commissioners 276
Browning *v.* Carson 255
Burbank (Emery *v.*) . . . 326
Butchers' Slaughtering & Melting Association *v.* Commonwealth 386

Cambridge (Boston Electric Co. *v.*) 64
——— (Scannal *v.*) 91
Campbell (Loker *v.*) 242
Carr *v.* West End Street Railway 360
Carrol (Damon *v.*) 404
Carroll *v.* Willcutt 221
Carson (Browning *v.*) . . . 255
Carville *v.* Westford 544
Casey *v.* Malden 507
Chesebro *v.* Barme 79
Clapp (Kendall *v.*) 69
Cling (Marsters *v.*) 477
Cloutman *v.* Concord . . . 444
Commonwealth (Butchers' Slaughtering & Melting Association *v.*) 386
——— *v.* Connelly 539
——— *v.* Fuller 499
——— *v.* Green 103
——— *v.* Hayden 453

Digitized by Google

Commonwealth *v.* Intoxicating Liquors 42
——— *v.* Kelly 169
——— *v.* McCabe 98
——— *v.* ——— 400
——— *v.* McCarthy 168
——— *v.* ——— 458
——— *v.* Mosby 291
——— *v.* Sheehan 170
——— *v.* Smith 411
——— *v.* Walker 226
——— *v.* Welch 372
Commonwealth Loan Co. (Schayer *v.*) 322
Concord (Cloutman *v.*) . . . 444
Connelly (Commonwealth *v.*) . 539
——— *v.* Hamilton Woolen Co. 156
Connery *v.* Manning 44
Cooke (Walker *v.*) 401
County of Suffolk (Hibbard *v.*) 34
Craig Silver Co. *v.* Smith . . 262
Cunningham *v.* Merrimac Paper Co. 89
Curtis (Marston *v.*) 296
Cutter *v.* Gillette 95
——— (Robinson *v.*) . . . 377

Damon *v.* Carrol 404
Davis *v.* Mills 481
Di Filippo *v.* Allen 528
Doane (Abbott *v.*) 433
Dover Stamping Co. *v.* Fellows 191
Downs (Brickett *v.*) 70
Draper *v.* Hollings 127
Driscoll *v.* Fall River . . . 105

Eager *v.* Whitney 463
Eaton (Brownell *v.*) 463
Ela (Sirk *v.*) 394
Ellis *v.* Ginsburg 143
Emery *v.* Burbank 326
Everett (Gray *v.*) 77

Fall River (Driscoll *v.*) . . . 105
Feely (New York & New England Railroad *v.*) 205
Fellows (Dover Stamping Co. *v.*) 191
Fitch *v.* Randall 381
Fitchburg Railroad (Livermore *v.*) 132
Floytrup *v.* Boston & Maine Railroad 152
Fort Payne Coal & Iron Co. *v.* Webster 134
Freeman *v.* Hunnewell . . . 210
Fuller (Commonwealth *v.*) . . 499

Gillette (Cutter *v.*) 95
Ginsburg (Ellis *v.*) 143
Giroux *v.* Wheeler 48
Grace, In re 558
Gray *v.* Everett 77
Green (Commonwealth *v.*) . . 103
Grindley *v.* McKechnie . . . 494
Grover (Jones *v.*) 564
Gurney (Shea *v.*) 184

Haddock (Phillips *v.*) . . . 201
Hamilton *v.* West End Street Railway 199
Hamilton Woolen Co. (Connelly *v.*) 156
Hand (Noble *v.*) 289
Harding *v.* Boston 14
Harriman *v.* Woburn Electric Light Co. 85
Harrison *v.* Moran 495
Hartin (Whitten *v.*) 39
Hayden (Commonwealth *v.*) . 453
Hibbard *v.* County of Suffolk . 34
Hiland (Melrose *v.*) 303
Hill (Pearse *v.*) 493
Hobson *v.* Satterlee 402
Holbrook *v.* Nesbitt 120
Hollings (Draper *v.*) . . . 127
Holmes *v.* Jordan 147
Hudson (Hudson Electric Light Co. *v.*) 346
Hudson Electric Light Co. *v.* Hudson 346
Hunnewell (Freeman *v.*) . . 210
Huse *v.* Amesbury Board of Health 240

Intoxicating Liquors (Commonwealth *v.*) 42

Jamesville Manuf. Co. (Marble *v.*) 171
Jenkins (Atwell *v.*) 362

Digitized by Google

Jenkins (Ryder *v.*) 536
Jones *v.* Boston & Maine Railroad 245
——— *v.* Grover 564
——— *v.* Parker 564
Jordan (Holmes *v.*) 147
——— (Palmer *v.*) 350

Kaffenburg *v.* Assner . . . 295
Kellogg *v.* Underwood . . . 214
Kelly (Commonwealth *v.*) . . 169
Kendall *v.* Clapp 69

Lang *v.* Terry 138
Lee *v.* Welch 312
Lefstrom. In re 356
Levie *v.* Metropolitan Life Ins. Co. 117
Livermore *v.* Fitchburg Railroad 132
Loker *v.* Campbell 242
Lowell (Tremont & Suffolk Mills *v.*) 283
Lowell & Suburban Street Railway (Ovington *v.*) . . 440
Lynch *v.* Richardson 160
Lynn & Boston Railroad (Wilde *v.*) 533
Lyons *v.* Boston Towage & Lighterage Co. 158

McCabe (Commonwealth *v.*) . 98
——— (Commonwealth *v.*) . 400
McCann *v.* Waltham . . . 344
McCarthy (Commonwealth *v.*) 168
——— (Commonwealth *v.*) . 458
McIntyre *v.* Boston & Maine Railroad 189
McKechnie (Grindley *v.*) . . 494
McPhee *v.* Scully 216
Malden (Casey *v.*) 507
Manchester Savings Bank (Steel Edge Stamping & Retinning Co. *v.*) 252
Manning (Connery *v.*) . . . 44
Manson *v.* Boston 479
Marble *v.* Jamesville Manuf. Co. 171
Marsters *v.* Cling 477
——— *v.* Pike 477
——— *v.* Wassmuth . . . 477
Marston *v.* Curtis 296
Marston *v.* Singapore Rattan Co. 296
Martin *v.* Bowker 461
Marwick *v.* Rogers 50
Mears *v.* Boston & Maine Railroad 150
Medford (White *v.*) 164
Melrose *v.* Hiland 303
Mercer (Borden *v.*) 7
Merrick (Supreme Commandery of the United Order of the Golden Cross *v.*) . . . 374
Merrill *v.* Beckwith 503
Merrimac Paper Co. (Cunningham *v.*) 89
Metropolitan Life Ins. Co. (Levie *v.*) 117
Miller *v.* Prescott 12
Mills (Davis *v.*) 481
Minnesota Title Ins. & Trust Co. (Nash *v.*) 574
Moran (Harrison *v.*) . . . 495
Morse (National Revere Bank *v.*) 383
Mosby (Commonwealth *v.*) . 291
Mullen (Boston Wall Paper Co. *v.*) 20
Murphy (Reardon *v.*) . . . 501

Nash *v.* Minnesota Title Ins. & Trust Co. 574
National Revere Bank *v.* Morse 383
Nesbitt (Holbrook *v.*) . . . 120
New England Trust Co. *v.* Pitkin 506
Newton *v.* Perry 319
New York & New England Railroad *v.* Feely 205
——— (Smith *v.*) 569
Noble *v.* Hand 289
Noyes *v.* Stone 490

O'Brien *v.* Bailey 325
O'Connor (Walcott *v.*) . . . 21
Old Colony Railroad, petitioner 356
Opinion of the Justices . . . 589
Ovington *v.* Lowell & Suburban Street Railway . . . 440

Paige (Pattee *v.*) 352
Palmer *v.* Jordan 350

Digitized by Google

Parker (Jones *v.*) 564
Pattee *v.* Paige 352
Pearse *v.* Hill 493
Perkins *v.* Stearns 247
Perry (Newton *v.*) 319
Phillips *v.* Haddock 201
Pike (Marsters *v.*) 477
Pitkin (New England Trust Co. *v.*) 506
Place *v.* Washburn 530
Poor (Thomson *v.*) 26
Powers *v.* Quincy & Boston Street Railway 5
Prescott (Miller *v.*) 12
Provident Savings Life Assurance Society of New York (White *v.*) 108

Quincy & Boston Street Railway (Powers *v.*) 5

Railroad Commissioners (Brownell *v.*) 276
Randall (Fitch *v.*) 381
Raymond Skate Co. (Usher *v.*) 1
Reardon *v.* Murphy 501
Richardson (Lynch *v.*) . . . 160
——— *v.* Willis 130
Robinson *v.* Cutter 377
——— *v.* Way 212
Rogers (Marwick *v.*) . . . 50
Ryder *v.* Jenkins 536

St. John's Schools (Boland *v.*) 229
Satterlee (Hobson *v.*) . . . 402
S. A. Woods Machine Co. (Wentworth *v.*) 28
Scannal *v.* Cambridge . . . 91
Schayer *v.* Commonwealth Loan Co. 322
Scully (McPhee *v.*) 216
Seaver *v.* Weston 202
Seaverns (Stratton *v.*) . . . 73
Seavey (Baker *v.*) 522
Shea *v.* Gurney 184
—— *v.* Wellington 364
Sheehan (Commonwealth *v.*) . 170
Shute *v.* Wilkins 491
Simmons (Ashcroft *v.*) . . . 437
Singapore Rattan Co. (Marston *v.*) 296
Sirk *v.* Ela 394
Slocum *v.* Brookline 23
Smith (Commonwealth *v.*) . . 411
——— (Craig Silver Co. *v.*) . 262
——— *v.* New York & New England Railroad 569
Sprow *v.* Boston & Albany Railroad 330
Standard Button Fastening Co. *v.* Breed 10
Stearns (Perkins *v.*) 247
Steel Edge Stamping & Retinning Co. *v.* Manchester Savings Bank 252
——— (Wilson *v.*) 315
Stone (Noyes *v.*) 490
—— *v.* Stone 474
Stratton *v.* Seaverns 73
Stuart *v.* West End Street Railway 391
Suffolk County (Hibbard *v.*) . 34
Sullivan (Attorney General *v.*) 446
——— *v.* Borden 470
——— (Tangney *v.*) . . . 166
Supreme Commandery of the United Order of the Golden Cross *v.* Merrick 374
Swift (Twomey *v.*) 273

Taft *v.* Taft 467
Tangney *v.* Sullivan 166
Terry (Lang *v.*) 138
Thomson *v.* Poor 26
Tremont & Suffolk Mills *v.* Lowell 283
Tufts *v.* Bennett 398
Twomey *v.* Swift 273

Underwood (Kellogg *v.*) . . 214
United Order of the Golden Cross *v.* Merrick 374
Usher *v.* Raymond Skate Co. . 1

Walcott *v.* O'Connor 21
Walker (Commonwealth *v.*) . 226
——— *v.* Cooke 401
Waltham (McCann *v.*) . . . 344
Warren *v.* Boston & Maine Railroad 484
Washburn (Place *v.*) . . . 530
Wassmuth (Marsters *v.*) . . 477
Way (Robinson *v.*) 212

Digitized by Google

Webster (Fort Payne Coal & Iron Co. *v.*) 134
Welch (Commonwealth *v.*) . 372
——— (Lee *v.*) 312
Wellington (Shea *v.*) . . . 364
Wentworth *v.* S. A. Woods Machine Co. 28
West End Street Railway (Carr *v.*) 360
——— (Hamilton *v.*) . . . 199
——— (Stuart *v.*) 391
Westford (Carville *v.*) . . . 544
Weston (Seaver *v.*) 202
Wheeler (Giroux *v.*) . . . 48
White *v.* Medford 164
White *v.* Provident Savings Life Assurance Society of New York 108
Whitney (Eager *v.*) 463
Whitten *v.* Hartin 39
Wilde *v.* Lynn & Boston Railroad 533
Wilkins (Shute *v.*) 491
Willcutt (Carroll *v.*) 221
Willis (Richardson *v.*) . . . 130
Wilson *v.* Steel Edge Stamping & Retinning Co. . . 315
Woburn Electric Light Co. (Harriman *v.*) 85

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TABLE OF CASES

CITED BY THE COURT.

Abbot of Strata Mercella's case, The, 9 Co. Rep. 40 450
Abbott *v.* Stearns, 139 Mass. 168 561
Adams *v.* Clark, 9 Cush. 215 324
——— *v.* Cummiskey, 4 Cush. 420 80
——— *v.* Natick, 13 Allen, 429 93
Ætna Ins. Co. *v.* France, 94 U. S. 561 376
Aiken *v.* Bridgman, 37 Vt. 249 204
Albee *v.* Ward, 8 Mass. 79 81
Alden *v.* Stebbins, 99 Mass. 616 492
Alexander *v.* Kaiser, 149 Mass. 321 361
Allen *v.* Berryhill, 27 Iowa, 534 363
——— *v.* Codman, 139 Mass. 136 46
American Bank *v.* Rollins, 99 Mass. 313 266
American Order of Scottish Clans *v.* Merrill, 151 Mass. 558 198
Ames *v.* Kansas, 111 U. S. 449 449
Amos *v.* Oakley, 131 Mass. 413 97
Anderson *v.* Fitzgerald, 4 H. L. Cas. 484 114
——— *v.* Ocean Steamship Co. 10 App. Cas. 107 52
Andrews *v.* Frye, 104 Mass. 234 433
Angus *v.* Clifford, [1891] 2 Ch. 449 578
Archer *v.* State, 106 Ind. 426 418
Arkerson *v.* Dennison, 117 Mass. 407 275
Arlington *v.* Cutter, 114 Mass. 344 311
Arnold *v.* Chapman, 13 R. I. 586 531
Attorney General *v.* Abbott, 154 Mass. 323 514
——— *v.* Algonquin Club, 153 Mass. 447 239
——— *v.* Boston, 142 Mass. 200 36
——— *v.* Crocker, 138 Mass. 214 452
——— *v.* Farnham, Hardres, 504 450
——— *v.* Gardiner, 117 Mass. 492 501
——— *v.* Jamaica Pond Aqueduct, 133 Mass. 361 321
——— *v.* Jochim, 99 Mich. 358 451
——— *v.* Life & Fire Ins. Co. 4 Paige, 224 568
Attorney General *v.* Salem, 108 Mass. 138 447
Atwood *v.* Lucas, 53 Maine, 508 399
Auriol *v.* Mills, 4 T. R. 94 568

Babson *v.* Rockport, 101 Mass. 93 94
Bachelour *v.* Gage, Cro. Car. 188 568
Bacon *v.* Towne, 4 Cush. 217 46
Bagnall *v.* Davis, 140 Mass. 76 502
Bain *v.* Whitehaven & Furness Junction Railway, 3 H. L. Cas. 1 327
Baker *v.* Carpenter, 127 Mass. 226 482
——— *v.* Lothrop, 155 Mass. 376 218
——— *v.* M'Duffie, 23 Wend. 289 528
——— *v.* Wahrmund, 5 Tex. Civil App. 268, *n.* 436
Balcom *v.* Haynes, 14 Allen, 204 252
Ballard *v.* Demmon, 156 Mass. 449 339
Ballou *v.* Billings, 136 Mass. 307 581
Bally *v.* Wells, Wilmot, 341 567
Bank of Genesee *v.* Patchin Bank, 3 Kernan, 309 4
Barnard *v.* Godscall, Cro. Jac. 309 568
Barnes *v.* Chicopee, 138 Mass. 67 94
——— *v.* Rettew, 8 Phila. 133 254
Barry *v.* Cavanagh, 127 Mass. 394 399
Bartlett *v.* Bramhall, 3 Gray, 257 254
Barton *v.* Bigelow, 4 Gray, 353 69
Bassett *v.* Brown, 105 Mass. 551 581
——— *v.* Granger, 100 Mass. 348 252
——— *v.* Percival, 5 Allen, 345 302
Batchelder *v.* Batchelder, 2 Allen, 105 167
Bates, petitioner, 159 Mass. 252 465
Bates *v.* Chapin, 8 Cush. 99 178, 253
——— *v.* Sabin, 64 Vt. 511 204
——— *v.* Westborough, 151 Mass. 174 309
Battle *v.* Davis, 66 N. C. 252 137
Bayley, petitioner, 132 Mass. 457 148
Bean *v.* Hyde Park, 143 Mass. 245 68
Bell *v.* Great Northern Railway, 26 L. R. Ir. 428 487
Bemis *v.* Smith, 10 Met. 194 355
Bennett *v.* New Bedford, 110 Mass. 433 24
Benson *v.* Carr, 73 Maine, 76 178

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Bent *v.* Cullen, L. R. 6 Ch. 235 513
Berkey *v.* Judd, 22 Minn. 287 580
Bevan, Ex parte, 10 Ves. 107 354
Beveridge *v.* New York Elevated Railroad, 112 N. Y. 1 486
Bicknell *v.* New York & New England Railroad, 161 Mass. 428 572
Bigelow *v.* Legg, 102 N. Y. 652 399
Bigelow Co. *v.* Heintze, 24 Vroom, 69 584
Biggerstaff *v.* Marston, 161 Mass. 101 32
Billows *v.* Moors, 162 Mass. 42 188
Black *v.* Ridgway, 131 Mass. 80 302
Blaine *v.* The Charles Carter, 4 Cranch, 328 81
Blair *v.* Laflin, 127 Mass. 518 97
Blake *v.* Dexter, 12 Cush. 559 251
——— *v.* Everett, 1 Allen, 248 340
——— *v.* Mahan, 2 Allen, 75 409
——— *v.* Stoddard, 107 Mass. 111 556
Blakemore *v.* Stanley, 159 Mass. 6 501
Blanchard *v.* Ayer, 148 Mass. 174 68
——— *v.* Cooke, 144 Mass. 207 87
——— *v.* Waters, 10 Met. 185 82
Blodgett *v.* Hildreth, 8 Allen, 186 326
Bloomer *v.* State, 48 Md. 521 418
Booth *v.* Clark, 17 How. 322 563
Borden *v.* Borden, 5 Mass. 67 324
Boston *v.* Richardson, 13 Allen, 146 286
Boston & Worcester Railroad *v.* Western Railroad, 14 Gray, 253 357
Bott *v.* Burnell, 11 Mass. 163 148
Bowditch *v.* Soltyk, 99 Mass. 136 522
Bower *v.* Peate, 1 Q. B. D. 321 19
Boynton *v.* Willard, 10 Pick. 166 528
Brackett *v.* Lubke, 4 Allen, 138 18
Bradley *v.* Fuller, 23 Pick. 1 326
——— *v.* ———, 118 Mass. 239 526
Brainard *v.* Clapp, 10 Cush. 6 321
Braintree Water Supply Co. *v.* Braintree, 146 Mass. 482 348
Brande *v.* Grace, 154 Mass. 210 502, 567
Breed *v.* Hurd, 6 Pick. 356 323
Brett *v.* Cumberland, Cro. Jac. 521 568
Bridge *v.* Bridge, 146 Mass. 373 522
Briggs *v.* Wardwell, 10 Mass. 356 80
Brigham *v.* Burnham, 12 Allen, 97 493
——— *v.* Carlisle, 78 Ala. 243 291
——— *v.* Evans, 118 Mass. 538 528
Brill *v.* Singer Manuf. Co. 41 Ohio St. 127 196
Bristol, Cardiff, & Swansea Aërated Bread Co. *v.* Maggs, 44 Ch. D. 616 126
Britt *v.* State, 7 Humph. 45 294
Broad *v.* Ham, 5 Bing. N. C. 722 47
Brock *v.* Old Colony Railroad, 146 Mass. 194 357
Brooks *v.* Lynde, 7 Allen, 64 881
——— *v.* Somerville, 106 Mass. 271 18
Brow *v.* Boston & Albany Railroad, 157 Mass. 399 486, 586
Brown *v.* Davis, 9 N. H. 76 528
——— *v.* Edgington, 2 Man. & G. 279 587
——— *v.* Massachusetts Title Ins. Co. 151 Mass. 127 580
——— *v.* Providence, Warren, & Bristol Railroad, 5 Gray, 35 165
Browne *v.* Doolittle, 151 Mass. 595 382
Brownlee *v.* Lowe, 117 Ind. 420, *n.* 436
Bruce *v.* Warwick, 6 Taunt. 118 363
Bryant *v.* Johnson, 24 Maine, 304 82
Buck *v.* Adams, 18 Stew. 552 501
Buckhause, In re, 10 Nat. Bankr. Reg. 206 354
Buckman *v.* State, 34 Fla. 48 451
——— *v.* ———, 24 Law. Ann. Rep. 806, *n.* 451
Buffington *v.* Cook, 35 Ala. 312 486
Bull *v.* Clarke, 2 Met. 587 80
Bullard *v.* Moor, 158 Mass. 418 863
——— *v.* Shirley, 153 Mass. 559 568
Buller *v.* Harrison, Cowp. 565 363
Burke *v.* Dulaney, 153 U. S. 228 384
Burns *v.* Washburn, 160 Mass. 457 224, 370
Burton *v.* English, 12 Q. B. D. 218 52
Bushby *v.* New York, Lake Erie, & Western Railroad, 107 N. Y. 374 191
Butchers' Slaughtering & Melting Association *v.* Commonwealth, 163 Mass. 386 479
Butler *v.* Mullen, 100 Mass. 453 352

Calder *v.* Kurby, 5 Gray, 597 471
Campbell *v.* New England Ins. Co. 98 Mass. 381 114
——— *v.* Talbot, 132 Mass. 174 449
Campion *v.* Baker, Lutw. (Nelson's ed.) 356 49
Canning *v.* Williamstown, 1 Cush. 451 487
Cannon *v.* Alsbury, 1 A. K. Marsh. 76 363
Carew *v.* Stubbs, 155 Mass. 549 8
Carey *v.* Boston & Maine Railroad, 158 Mass. 228 393
Carpenter *v.* Allen, 150 Mass. 281 33
——— *v.* Walker, 140 Mass. 416 33
Carr *v.* London & Northwestern Railway, T. R. 10 C. P. 307 527
Carrier *v.* Sears, 4 Allen, 336 363
Carter *v.* Cambridge & Brookline Bridge, 104 Mass. 236 309
Cashman *v.* Chase, 156 Mass. 342 370
Cassidy *v.* Old Colony Railroad, 141 Mass. 174 321
Catlin *v.* Allen, 17 Vt. 158 204
Chadwick *v.* Covell, 151 Mass. 190 198
Chamberlin *v.* Morgan, 68 Penn. St. 168 97
Chapin *v.* Parker, 157 Mass. 68 132
Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403 578
Cheavin *v.* Walker, 5 Ch. D. 850 195
Cheney *v.* Whitely, 9 Cush. 289 215
Chester *v.* Comstock, 40 N. Y. 575 578
Child *v.* Boston, 4 Allen, 41 310
Churchill *v.* Palmer, 115 Mass. 310 538
Churton *v.* Douglas, H. R. V. Johns. 174 126, 462
Ciriack *v.* Merchants' Woolen Co. 146 Mass. 182 393
Citizens' Gas Light Co. *v.* Wakefield, 161 Mass. 432 348
Clapp *v.* Campbell, 124 Mass. 50 526

Digitized by Google

Clark *v.* Leach, 32 Beav. 14 125
—— *v.* Russell, 116 Mass. 455 68
—— *v.* State, 142 N. Y. 101 36
—— *v.* Thayer, 105 Mass. 216 385
—— *v.* Worcester, 125 Mass. 226 390
Clearwater *v.* Meredith, 1 Wall. 25 266
Clemens, In re, 8 Nat. Bankr. Reg. 279 180
Clement *v.* British American Assurance Co. 141 Mass. 298 528
Clement & Hawkes Manuf. Co. *v.* Meserole, 107 Mass. 362 399
Cleves *v.* Willoughby, 7 Hill, (N. Y.) 83 567
Clink *v.* Radford, [1891] 1 Q. B. 625 57
Coates *v.* Boston & Maine Railroad, 153 Mass. 297 189
Coats *v.* Merrick Thread Co. 36 Fed. Rep. 324 196
Coburn *v.* Boston Papier Maché Manuf. Co. 10 Gray, 248 253
—— *v.* Palmer, 10 Cush. 273 215
Cochrane *v.* Malden, 152 Mass. 365 310
Coffin *v.* Palmer, 162 Mass. 192 557
Coggill *v.* Hartford & New Haven Railroad, 3 Gray, 545 82
Cohn, In re, 7 Nat. Bankr. Reg. 31 180
Colburn *v.* Woodworth, 31 Barb. 381 96
Coldwater *v.* Tucker, 36 Mich. 474 309
Cole *v.* State, 5 English, (Ark.) 318 458
Colkett *v.* Freeman, 2 T. R. 59 172
Colling, In re, 32 Ch. D. 333 505
Collins *v.* Holyoke, 146 Mass. 298 25, 357
Columbia Mill Co. *v.* Alcorn, 150 U. S. 460 194
Commissioners of Marion County *v.* Clark, 94 U. S. 278 341
Commonwealth *v.* Adams, 1 Gray, 481 500
—— *v.* Allen, 128 Mass. 308 448
—— *v.* Athearn, 3 Mass. 285 448
—— *v.* Barrett, 108 Mass. 302 541
—— *v.* Bonner, 97 Mass. 587 431
—— *v.* Bradford, 9 Met. 268 543
—— *v* Brady, 147 Mass. 583 44
—— *v.* Brailey, 134 Mass. 527 102
—— *v.* Brelsford, 161 Mass. 61 378, 400
—— *v.* Chiovaro, 129 Mass. 489 228
—— *v.* Churchill, 136 Mass. 148 44
—— *v.* Clark, 14 Gray, 367 103
—— *v.* Coe, 115 Mass. 481 580
—— *v.* Cohen, 120 Mass. 198 228
—— *v.* Costello, 121 Mass. 371 459
—— *v.* Cutter, 98 Mass. 31 405
—— *v.* Davidson, 1 Cush. 33 526
—— *v.* Dearborn, 15 Mass. 125 452
—— *v.* Dill, 156 Mass. 226 456
—— *v.* Emmons, 98 Mass. 6 542
—— *v.* Farren, 9 Allen, 489 542
—— *v.* Ferry, 146 Mass. 203 542
—— *v.* Finnerty, 148 Mass. 162 103
—— *v.* Fowler, 11 Mass. 339 449
—— *v.* Franklin Ins. Co. 115 Mass. 278 561
—— *v.* Fredericks, 119 Mass. 199 455
—— *v.* Funai, 146 Mass. 570 102
Commonwealth *v.* Glover, 111 Mass. 395 228
—— *v.* Goodman, 97 Mass. 117 542
—— *v.* Gorham, 99 Mass. 420 431
—— *v.* Graves, 155 Mass. 168 228
—— *v.* Gray, 150 Mass. 327 543
—— *v.* Hamilton Manuf. Co. 120 Mass. 383 594
—— *v.* Hanley, 140 Mass. 457 433
—— *v.* Harlow, 110 Mass. 411 433
—— *v.* Harriman, 134 Mass. 314 452
—— *v.* Harrington, 130 Mass. 35 228
—— *v.* Harris, 13 Allen, 534 541
—— *v.* Hazeltine, 108 Mass. 479 102, 400
—— *v.* Hogan, 97 Mass. 122 400
—— *v.* Huntley, 156 Mass. 236 169
—— *v.* Hyland, 155 Mass. 7 373
—— *v.* Intoxicating Liquors, 107 Mass. 396 43
—— *v.* Julius, 143 Mass. 132 104
—— *v.* Lannan, 13 Allen, 563 431
—— *v.* Littlejohn, 15 Mass. 163 456
—— *v.* McCabe, 163 Mass. 98 400
—— *v.* McCauley, 105 Mass. 69 400
—— *v.* Macloon, 101 Mass. 1 330
—— *v.* McShane, 110 Mass. 502 102, 400
—— *v.* Maloney, 113 Mass. 211 433
—— *v.* Mash, 7 Met. 472 457
—— *v.* Merriam, 148 Mass. 425 44
—— *v.* Moore, 162 Mass. 441 431
—— *v.* Morgan, 107 Mass. 199 431
—— *v.* Mullen, 97 Mass. 545 431
—— *v.* Munson, 127 Mass. 459 457
—— *v.* Myers, 160 Mass. 530 171
—— *v.* Newburyport, 103 Mass. 129 309
—— *v.* Nichols, 114 Mass. 285 431
—— *v.* Norcross, 9 Mass. 492 456
—— *v.* O'Donnell, 8 Allen, 548 400
—— *v.* Perry, 155 Mass. 117 594
—— *v.* Pratt, 126 Mass. 462 431
—— *v.* Price, 10 Gray, 472 431
—— *v.* Raymond, 97 Mass. 567 542
—— *v.* Russell, 162 Mass. 520 169
—— *v.* Scott, 123 Mass. 239 433
—— *v.* Shea, 150 Mass. 314 542
—— *v.* Smead, 11 Mass. 74 448
—— *v.* Smith, 132 Mass. 289 424
—— *v.* Stevens, 153 Mass. 421 104
—— *v.* Sullivan, 150 Mass. 315 431
—— *v.* Swasey, 133 Mass. 538 452
—— *v.* Tenth Massachusetts Turnpike Co. 11 Cush. 171 452
—— *v.* Tolliver, 119 Mass. 312 431
—— *v.* Uhrig, 138 Mass. 492 104
—— *v.* Vahey, 151 Mass. 57 373
—— *v.* Warren, 160 Mass. 538 543
—— *v.* Wentworth, 118 Mass. 441 542
—— *v.* Westborough, 3 Mass. 406 359
—— *v.* Woodward, 157 Mass. 516 455
Comstock *v.* Hier, 73 N. Y. 269 385
Conklin *v.* Old Colony Railroad, 154 Mass. 155 821
Conners *v.* Hennessey, 112 Mass. 96 18

Digitized by Google

Connolly v. Eldredge, 160 Mass. 566 318, 393
Consolidated Fruit Jar Co., In re, 14 U. S. Pat. Gaz. 269 196
Cook v. Cook, 11 Gray, 123 491
—— v. Doggett, 2 Allen, 439 824
Cooke v. Murphy, 70 Ill. 96 435
Coolidge v. Brigham, 1 Allen, 333 409
Cooper v. Landon, 102 Mass. 58 587
Copeland v. Draper, 157 Mass. 558 163
Cork v. Blossom, 162 Mass. 330 19
Coulter v. Haynes, 146 Mass. 458 525
Coupal v. Ward, 106 Mass. 289 45
Cowley v. Smith, 17 Vroom, 380 578
Cox v. Prentice, 3 M. & S. 344 363
Crafts v. Boston, 109 Mass. 519 138
Crain v. Paine, 4 Cush. 483 525
Creed v. Kendall, 156 Mass. 291 7
Croacher v. Oesting, 148 Mass. 195 148
Croak v. Owens, 121 Mass. 28 528
Crompton v. Pratt, 105 Mass. 255 34
Crookewit v. Fletcher, 26 L. J. (Ex.) 153 58
Crooks v. Allan, 5 Q. B. D. 38 56
Crossan v. New York & New England Railroad, 149 Mass. 196 4
Crowley v. Appleton, 148 Mass. 98 429
Cuming, In re, L. R. 5 Ch. 72 505
Curran v. Boston, 151 Mass. 505 345
Curry v. Porter, 125 Mass. 94 538
Cushing v. Field, 9 Met. 180 382
Cutler v. Rice, 14 Pick. 494 146
Cutting v. Grand Trunk Railway, 13 Allen, 381 399

Dahill v. Booker, 140 Mass. 308 584
Dahl v. Nelson, 6 App. Cas. 38 58
Damon v. Boston, 149 Mass. 147 94
——— v. Carroll, 163 Mass. 407 83
——— v. Granby, 2 Pick. 345 67
Danby v. Beardsley, 48 L. T. (N. S.) 603 167
Danforth v. Durell, 8 Allen, 242 340
Daniels v. New York & New England Railroad, 154 Mass. 349 188, 495
Darell v. Bridge, 1 Wm. Bl. 46 450
Davenport v. First Congregational Society, 33 Wis. 387, n. 436
Davies v. New York, 93 N. Y. 250 68
Davis v. Estey, 8 Pick. 475 204
——— v. Harding, 3 Allen, 302 49, 440
——— v. New York, New Haven, & Hartford Railroad, 159 Mass. 532 133, 148, 151
——— v. Old Colony Railroad, 131 Mass. 258 4
Day v. Worcester, Nashua, & Rochester Railroad, 151 Mass. 302 266
Deane v. Home for Aged Colored Women, 111 Mass. 132 522
Dearborn v. Ames, 8 Gray, 1 253
Debinson v. Emmons, 158 Mass. 592 82
Deerfield v. Connecticut River Railroad, 144 Mass. 325 343
De Giou v. Dover, Anst. 517 146
De Hahn v. Hartley, 1 T. R. 343 114
Denison v. Ralphson, 1 Vent. 365 587
Dennis v. Maxfield, 10 Allen, 138 97
——— v. Sayles, 11 Met. 233 183
Denny v. Williams, 5 Allen, 1 329
Dent v. King, 1 Ga. 200 486
Derry v. Peek, 14 App. Cas. 337 578
Desper v. Continental Water Meter Co. 137 Mass. 252 504
Dewey v. Peeler, 161 Mass. 135 150
Dewire v. Boston & Maine Railroad, 148 Mass. 343 246
Dingley v. Boston, 100 Mass. 544 321
Disque v. State, 20 Vroom, 249 431
Dodge v. County Commissioners, 3 Met. 380 165
Dole v. Wooldredge, 142 Mass. 161 431
Donelson v. Taylor, 8 Pick. 390 409
Donnelly v. Daggett, 145 Mass. 314 47
——— v. People, 11 Ill. 552 451
Doughty v. Bowman, 11 Q. B. 444 568
Douglas v. Stetson, 159 Mass. 428 823
Downer v. Chesebrough, 36 Conn. 39 327
Downey v. Sawyer, 157 Mass. 418 157, 318
Downs v. Flanders, 150 Mass. 92 533
Drew v. Smith, 59 Maine, 393 328
Drummond v. Crane, 159 Mass. 577 97
Dudley v. Briggs, 141 Mass. 582 526
Dunlop v. Balfour, [1892] 1 Q. B. 507 57
Dunphy v. Traveller Newspaper Association, 146 Mass. 495 127
Durgin v. Lowell, 3 Allen, 398 840
Durkee v. India Ins. Co. 159 Mass. 514 113, 118
Dwight v. Springfield City Council, 4 Gray, 107 358

Easter v. Allen, 8 Allen, 7 385
Eddy v. O'Hara, 132 Mass. 56 267
Edmands v. Boston, 108 Mass. 535 480
Edwards v. Currier, 43 Maine, 474 580
Eliza Lines, The, 61 Fed. Rep. 308 55
Ellis v. Boston, Hartford, & Erie Railroad, 107 Mass. 1 562
Ellison v. Jackson Water Co. 12 Cal. 542, n. 436
Elsey v. Odd Fellows' Relief Association, 142 Mass. 224 374
Embree v. Hanna, 5 Johns. 101 266
Embry v. Commonwealth, 79 Ky. 439 294
Emerson v. Badger, 101 Mass. 82 462
Emery's case, 107 Mass. 172 433
Emery v. Lowell, 104 Mass. 13 310
England v. Boston & Maine Railroad, 153 Mass. 490 155
Erie v. Caulkins, 85 Penn. St. 247 18
Erie School District v. Fuess, 98 Penn. St. 600 18
Estabrook, Ex parte, 2 Lowell, 547 4
Eustis v. Bolles, 146 Mass. 413 353
——— v. ———, 150 U. S. 361 353
Everett v. Henderson, 150 Mass. 411 84
Ewer v. Hobbs, 5 Met. 1 326
Ewing v. Filley, 43 Penn. St. 384 452

Digitized by Google

Fairbanks v. Jacobus, 14 Blatchf. C. C. 337 198
——— v. Lamson, 99 Mass. 533 514
Fall River National Bank v. Buffinton, 97 Mass. 498 527
Fant v. Miller, 17 Grat. 47 327
Fargo v. Miller, 150 Mass. 225 466
Farley v. Lovell, 103 Mass. 387 73
Farnum v. Pitcher, 151 Mass. 470 429
Farwell v. Hathaway, 151 Mass. 242 445
Felch v. Hooper, 119 Mass. 52 504
Fels v. Raymond, 139 Mass. 98 482
Felton v. Simpson, 11 Ired. 84 341
Feran v. Rudolphsen, 106 Mass. 471 260
Ferguson v. State, 2 Vroom, 289 531
Fernald v. Gay, 12 Cush. 596 254
Field v. Herrick, 101 Ill. 110 363
Fifield v. Northern Railroad, 42 N. H. 225 190
Fight v. State, 7 Ohio, 180 459
Fisher v. Mellen, 103 Mass. 503 578
——— v. Metropolitan Ins. Co. 160 Mass. 386 583
——— v. ———, 162 Mass. 236 583
——— v. Smith, 9 Gray, 441 236
Fitchburg Railroad v. Page, 131 Mass. 391 339
Fitzgerald v. Boston & Albany Railroad, 156 Mass. 293 370
Flagg v. Mann, 2 Sumn. 486 409
Fleck v. Union Railway, 134 Mass. 480 536
Flower v. Pennsylvania Railroad, 69 Penn. St. 210 188
Foot v. Lea, 13 Irish Eq. 484 125
Foote v. Merrill, 54 N. H. 490 491
Forbes v. Howe, 102 Mass. 427 580
——— v. Parker, 16 Pick. 462 526
Ford v. Garner, 15 Ind. 298, n. 436
Forsyth v. Hooper, 11 Allen, 419 18
Fort Dearborn National Bank v. Carter, 152 Mass. 34 581
Foster v. Pierce, 11 Cush. 437 431
Fowler v. Armour, 24 Ala. 194 96
Fox v. Harding, 7 Cush. 516 291
—— v. Union Sugar Refinery, 109 Mass. 292 237
Francis v. Daley, 150 Mass. 381 82
Franklin County National Bank v. Greenfield Bank, 138 Mass. 515 355
Frayes v. Worms, 19 C. B. (N. S.) 159 55
Freeland v Freeland, 102 Mass. 475 351
Freeman v. Creech, 112 Mass. 180 178
——— v. Winchester, 10 Sm. & M. 577 137
Freeman's National Bank v. Savery, 127 Mass. 75 385
Frisbie v. United States, 157 U. S. 160 593
Fuller v. Connelly, 142 Mass. 227 382
——— v. Meehan, 118 Mass. 135 83, 410

Gage v. Libby, 14 Allen, 261 52
Gaither v. Stockbridge, 67 Md. 222 562
Galligan v. Metacomet Manuf. Co. 143 Mass. 527 188
Gally v. Colt's Patent Fire Arms Manuf. Co. 80 Fed. Rep. 118 196
Garity v. Gigie, 130 Mass. 184 267
Garragan v. Fall River Iron Works, 158 Mass. 596 369
Garver v. Kent, 70 Ind. 428 138
Gay v. Essex Electric Street Railway, 159 Mass. 238 495, 508
Germantown Passenger Railway v. Walling, 97 Penn. St. 55 536
Gerrish v. Norris, 9 Cush. 167 137
Gibbons v. Williams, 135 Mass. 333 7
Gibbs v. Ames, 119 Mass. 60 167
——— v. Thayer, 6 Cush. 80 351
Gifford v. Thomas, 62 Vt. 34 204, 580
Gilbert v. West End Street Railway, 160 Mass. 408 202
Gilman v. Eastern Railroad, 13 Allen, 433 107
——— v. Hunnewell, 122 Mass. 139 197
Gilmore v. Holt, 4 Pick. 258 323
Glasier v. Rolls, 42 Ch. D. 436 578
Glenny v. Smith, 2 Dr. & Sm. 476 125
Globe Ins. Co. v. Cleveland Ins. Co. 14 Nat. Bankr. Reg. 311 254
Goddard's estate, In re, 29 Atl. Rep. 634, n. 436
Goddard v. Smithett, 8 Gray, 116 448
Goebel v. Linn, 47 Mich. 489 485
Goldthwait v. Haverhill & Groveland Street Railway, 160 Mass. 554 318
Goodall v. Myrick, 111 Mass. 484 410
Goodnow v. Walpole Emery Mills, 146 Mass. 261 393
Goodwin v. Massachusetts Loan & Trust Co. 152 Mass. 189 385
Gordon v. Brewster, 7 Wis. 355 96
——— v. Gordon, 56 N. H. 170, n. 436
Gorham v. Gross, 125 Mass. 232 19
Gormley v. Kyle, 137 Mass. 189 136
Goss v. Calhane, 113 Mass. 423 237
Gould v. Norfolk Lead Co. 9 Cush. 338 556
Grace v. Newton Board of Health, 135 Mass. 490 241
Grand Junction Railroad v. County Commissioners, 14 Gray, 553 78
Grand Tower Co. v. Phillips, 23 Wall. 471 399
Gray v. Carr, L. R. 6 Q. B. 522 58
—— v. Pullen, 5 B. & S. 970 19
—— v. Sherman, 5 Allen, 198 132
Green v. Hogan, 153 Mass. 462 513
Greene v. Farlow, 138 Mass. 146 146
Greenwood v. Curtis, 6 Mass. 358 327
Gresham v. Postan, 2 C. & P. 540 587
Grew v. Burditt, 9 Pick. 265 204
Griffin v. Boston & Albany Railroad, 148 Mass. 143 341
Gross v. Potter, 15 Gray, 556 188
Gullischen v. Stewart, 11 Q. B. D. 186 54
——— v. ———, 13 Q. B. D. 317 55

Hall v. Barrows, 4 DeG., J. & S. 150 197
—— v. Holden, 116 Mass. 172 348

Digitized by Google

Hall v. McLeod, 2 Met. (Ky.) 98 340
Hamilton Ins. Co. v. Hobart, 2 Gray, 543 266
Hammatt v. Emerson, 27 Maine, 308 578
——— v. Wyman, 9 Mass. 138 81
Hancock v. Yaden, 121 Ind. 366 591
Hanley v. Grand Trunk Railway, 62 N. H. 274 190
Hansen v. Harrold, [1894] 1 Q. B. 612 57
Hapgood v. Shaw, 105 Mass. 276 136
Harback v. Boston, 10 Cush. 295 321
Harbaugh v. People, 33 Mich. 241 451
Hardy v. Bininger, 4 Nat. Bankr. Reg. 262 180
Harlow v. Cowdrey, 109 Mass. 183 513
Harmon v. Harmon, 51 Fed. Rep. 113 363
Harriman v. State, 2 Greene, (Iowa) 270 458
Harrington v. Lincoln, 2 Gray, 133 361
Harrison v. Collins, 86 Penn. St. 153 19
Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221 578
Harvey v. Osborn, 55 Ind. 585 486
Haskell v. New Bedford, 108 Mass. 208 68
——— v. Sargent, 113 Mass. 341 252
Hastings v. Bolton, 1 Allen, 529 268
——— v. Lovejoy, 140 Mass. 261 435
Hatch v. Hatch, 60 Vt. 160 204
Hathaway v. Crocker, 7 Met. 262 427
Havana Press Drill Co. v. Ashurst, 148 Ill. 115, n. 436
Hay v. People, 59 Ill. 94 451
Hayward v. Howe, 12 Gray, 49 69
——— v. North Bridgewater School District, 2 Cush. 419 68
Hazard v. Loring, 10 Cush. 267 324, 580
Healy v. Reed, 153 Mass. 197 271
Hedden v. Griffin, 136 Mass. 229 582
Heely v. Barnes, 4 Denio, 73 409
Hennefin v. Blake, 102 Mass. 297 341
Hennessey v. New Bedford, 153 Mass. 260 346
Higgins v. Boston, 148 Mass. 484 94
Hill v. State, 17 Wis. 675 459
Hilliard v. Richardson, 3 Gray, 349 19
——— v. State, 100 Ala. 634 452
Hills v. Jones, 122 Mass. 412 84
Hillyer v. Dickinson, 154 Mass. 502 341, 372
Hinchley v. Greany, 118 Mass. 595 527
Hiram Holt Co. v. Wadsworth, 41 Fed. Rep. 34 196
Hirschorn v. Canney, 98 Mass. 149 32
Hoadley v. Northern Transportation Co. 115 Mass. 304 327
Hobart v. Tilton, 1 Greenl. 399 529
Holbrook v. Harrington, 16 Gray, 102 252
Holdsworth v. Tucker, 143 Mass. 369 137
Hole v. Sittingbourne & Sheerness Railway, 6 H. & N. 488 19
Holmes v. Doane, 9 Cush. 135 434
Holst v Stewart, 154 Mass. 445 578
Holt v. Somerville City Council, 127 Mass. 408 357
——— v. Ward Clarencieux, Strange, 937 363
Homer v. Wood, 11 Cush. 62 73
Hookham v. Pottage, L. R. 8 Ch. 91 125, 462
Hooper v. Cox, 117 Mass. 1 84
Hopewell Mills v. Taunton Savings Bank, 150 Mass. 519 33
Hopkins v. Ellis, 1 Salk. 110 172
Hoppin v. Worcester, 140 Mass. 222 275
Horne v. Meakin, 115 Mass. 326 168
Houghton v. Manufacturers' Ins. Co. 8 Met. 114 114
Howard v. Daly, 61 N. Y. 362 96
——— v. Hood, 155 Mass. 391 188
——— v. Merriam, 5 Cush. 563 478
Howe v. Weymouth, 148 Mass. 605 321
Howes v. Burt, 130 Mass. 368 350
Hoxie v. Chaney, 143 Mass. 592 126
Hubbard v. Boston & Albany Railroad, 159 Mass. 320 133
——— v. Lyman, 8 Allen, 520 213
Hubbell v. East Cambridge Five Cents Savings Bank, 132 Mass. 447 33
Hudson v. Marlborough, 154 Mass. 218 94
——— v. Osborne, 39 L. J. (N. S.) Ch. 79 125
Hughes v. Percival, 8 App. Cas. 443 19
Hunnewell v. Taylor, 6 Cush. 472 326
Hunt v. Jones, 12 R. I. 265 327
——— v. Peake, 5 Cowen, 475 363
Hurley v. Hurley, 148 Mass. 444 326
Hyde v. Moxie Nerve Food Co. 160 Mass. 559 9

Illingsworth v. Boston Electric Light Co. 161 Mass. 583 488
Ingalls v. Herrick, 108 Mass. 351 439

Jacot v. Wyatt, 10 Gray, 236 410
Jaha v. Belleg, 105 Mass. 208 268
Jewett v. Brooks, 134 Mass. 505 97
Johanson v. Boston & Maine Railroad, 153 Mass. 57 343
John Hancock Ins. Co. v. Worcester, Nashua, & Rochester Railroad, 149 Mass. 214 266
Johnson v. Boston & Maine Railroad, 125 Mass. 75 188
——— v. Boston Tow-Boat Co. 135 Mass. 209 275
——— v. Couillard, 4 Allen, 446 213
——— v. Harvey, 4 Mass. 483 82
——— v. Neale, 6 Allen, 227 527
——— v. Rockwell, 12 Ind. 76 363
——— v. Sellers, 33 Ala. 265, n. 436
Joliet v. Harwood, 86 Ill 110 19
Jones v. State, 26 Ohio St. 208 458
Jordan, Ex parte, 9 Met. 292 254
Jourdain v. Wilson, 4 B. & Ald. 266 568
Joy v. Diefendorf, 130 N. Y. 6 385

Digitized by Google

Judd v. Ives, 4 Met. 401 352
Judson v. Wass, 11 Johns. 525 136

Keith v. Wheeler, 159 Mass. 161 477
Kelley v. Norcross, 121 Mass. 508 274
Kelly v. New York, 1 Kernan, 432 18
—— v. State, 3 Sm. & Marsh. 518 458
Kenady v. Lawrence, 128 Mass. 318 108
Kenerson v. Henry, 101 Mass. 152 136
Kennedy v. Duncklee, 1 Gray, 65 81, 215
——— v. Spring, 160 Mass. 203 275
Kent v. Bothwell, 152 Mass. 341 204
—— v. Dunham, 106 Mass. 586 382
—— v. Whitney, 9 Allen, 62 528
Keyes v. Westford, 17 Pick. 278 67
Kilburn v. Adams, 7 Met. 33 340
Killea v. Faxon, 125 Mass. 485 275
Kimball v. Morris, 2 Met. 573 183
——— v. Rowland, 6 Gray, 224 13
King v. Eagle Mills, 10 Allen, 548 578
—— v. Goodwin, 16 Mass. 63 81
—— v. Steiren, 44 Penn. St. 99 97
King, The, v. Francis, 2 T. R. 484 450
——— v. Mein, 3 T. R. 596 451
Kingman, petitioner, 153 Mass. 566 357
——— v. County Commissioners, 6 Cush. 306 359
Kleeman v. Collins, 9 Bush, (Ky.) 460 327
Kline v. Shuler, 8 Ired. 484 167
Knight v. Boston, 159 Mass. 551 87
——— v. Thayer, 125 Mass. 25 84
Knoedler v. Boussod, 47 Fed. Rep. 465 462
——— v. Glaenzer, 55 Fed. Rep. 895 462
Kuschke v. St. Paul, 45 Minn. 225 357

Lamagdelaine v. Tremblay, 162 Mass. 339 361
L'Amoreux v. Gould, 3 Seld. 349, n. 436
Langdon v. Doud, 10 Allen, 433 527
Lapointe v. Middlesex Railroad, 144 Mass. 18 536
Lattimore v. Harsen, 14 Johns. 330 435
Lawrence v. Davey, 28 Vt. 264 435
Lee v. Whitney, 149 Mass. 447 385
Leep v. St. Louis, Iron Mountain, & Southern Railway, 58 Ark. 407 590
Lefavour v. McNulty, 158 Mass. 418 237
Lehan v. Good, 8 Cush. 302 529
Leland v. Adams, 12 Allen, 286 252
Le Lievre v. Gould, [1893] 1 Q. B. 491 578
Lenz v. Prescott, 144 Mass. 505 127
Leominster v. Conant, 139 Mass. 384 24
Leonard v. Whitney, 109 Mass. 265 49, 402
Leonard & Ellis's Trademark, In re, 26 Ch. D. 288 195
Leroux v. Brown, 12 C. B. 801 327
Levy v. Walker, 10 Ch. D. 436 125
Lichtenstein v. Brooks, 75 Tex. 196 96
Linnehan v. Rollins, 137 Mass. 123 18
Linoleum Manuf. Co. v. Nairn, 7 Ch. D. 834 196
Linton v. Allen, 147 Mass. 231 136
——— v. ———, 154 Mass. 432 324
Linzee v. Mixer, 101 Mass. 512 239
Little v. Cambridge, 9 Cush. 298 445
Locke v. Lewis, 124 Mass. 1 73
Logan v. New Bedford, 157 Mass. 534 94
Loker v. Brookline, 18 Pick. 343 68
Lorillard v. Pride, 28 Fed. Rep. 434 196
Lothrop v. Bailey, 14 Allen, 514 410
——— v. Highland Foundry Co. 128 Mass. 120 254
Lovegrove v. Brown, 60 Maine, 592 81
Lowber's appeal, 8 W. & S. 387 82
Lowe v. Harwood, 139 Mass. 133 136
Lowell v. County Commissioners, 3 Allen, 546 288
——— v. ———, 146 Mass. 403 288
——— v. ———, 152 Mass. 372 284
Lowell Five Cents Savings Bank v. Winchester, 8 Allen, 109 68
Lucas v. Comerford, 3 Bro. Ch. 166 506
Lyman v. Amherst, 107 Mass. 339 94
Lynch v. Allyn, 160 Mass. 248 143, 224, 370
——— v. Commonwealth, 88 Penn. St. 189 459
——— v. Forbes, 161 Mass. 302 357
——— v. Union Institution for Savings, 158 Mass. 394 239
——— v. ———, 159 Mass. 306 239, 502

McAlister v. Burgess, 161 Mass. 269 514
McCarty v. Leary, 118 Mass. 509 361
McCauley v. Norcross, 155 Mass. 584 225
McCreary v. Boston & Maine Railroad, 153 Mass. 300 339
McCue v. Whitwell, 156 Mass. 205 8
McDonald v. Snelling, 14 Allen, 290 441
McEachern v. Boston & Maine Railroad, 150 Mass. 515 495
McGeary v. Eastern Railroad, 135 Mass. 363 7
McGee v. Salem, 149 Mass. 238 286
McLean v. Richardson, 127 Mass. 339 167
McMahan v. Geiger, 73 Mo. 145 486
McNaughton, In re, 8 Nat. Bankr. Reg. 44 180
Magee v. West End Street Railway, 151 Mass. 240 143
Magee Furnace Co. v. Le Barron, 127 Mass. 115 198
Maguire v. Middlesex Railroad, 115 Mass. 239 536
Maher v. Boston & Albany Railroad, 158 Mass. 36 138
Manners v. Johnson, 1 Ch. D. 673 501
Marsh v. Falker, 40 N. Y. 562 578
Marshall v. Crehore, 13 Met. 462 326
——— v. Ipswich, 110 Mass. 522 94
Marsland v. Murray, 148 Mass. 91 7
Marston v. Singapore Rattan Co. 163 Mass. 296 582
Martin v. Bayley, 1 Allen, 381 49
——— v. Campbell, 120 Mass. 126 581

Digitized by Google

Mason v. Smith, 131 Mass. 510 568
Masters v. Ibberson, 8 C. B. 100 581
Maurer v. People, 48 N. Y. 1 459
Meesel v. Lynn & Boston Railroad, 8 Allen, 234 536
Melrose v. Cutter, 159 Mass. 461 309
Menard v. Boston & Maine Railroad, 150 Mass. 386 133
Mendenhall v. Carter, 7 Nat. Bankr. Reg. 320 179
Merchants' National Bank v. Citizens' Gas Light Co. 159 Mass. 505 268
——— v. Haverhill Iron Works, 159 Mass. 158 384
Meriam v. Rundlett, 18 Pick. 511 267
Merrick v. Giddings, 1 Mackey, 394, n. 436
Merrigan v. Boston & Albany Railroad, 154 Mass. 189 486
Merrill v. Eastern Railroad, 139 Mass. 238 246
Merritt v. New York, New Haven & Hartford Railroad, 162 Mass. 326 155
Messenger v. Dennie, 137 Mass. 197 508
Metcalfe v. Cunard Steamship Co. 147 Mass. 66 188
Middlefield v. Church Mills Knitting Co. 160 Mass. 267 568
Milliken v. Thorndike, 103 Mass. 382 581
Minshull v. Oakes, 2 H. & N. 793 568
Mitchell, In re, 3 Nat. Bankr. Reg. 441 354
Moebs v. Wolffsohn, 143 Mass. 130 455
Monaghan v. Agricultural Ins. Co. 58 Mich. 288 363
——— v. Cox, 155 Mass. 487 47
Monahan v. Worcester, 150 Mass. 439 107
Montague v. Boston & Fairhaven Iron Works, 97 Mass. 502 403
Monument National Bank v. Globe Works, 101 Mass. 57 4
Moody v. Whitney, 38 Maine, 174 491
Moore v. Boston & Albany Railroad, 159 Mass. 399 344
——— v. Spiegel, 143 Mass. 413 266, 525
Morey v. Commonwealth, 108 Mass. 433 400
Morgan v. Abbott, 148 Mass. 507 351
——— v. Curley, 142 Mass. 107 83, 411
——— v. Evans, 72 Ill. 586 82
Moriarty v. Kent, 71 Ind. 601 138
Morse v. Hutchins, 102 Mass. 439 581
——— v. Lowell, 7 Met. 152 355
——— v. Stearns, 131 Mass. 389 522
Morton v. Sweetser, 12 Allen, 134 266
Moulton v. Barker, 115 Mass. 36 178
Moynihan v. Allyn, 162 Mass. 270 211
——— v. Hills Co. 146 Mass. 586 369
Mullen v. Brown, 138 Mass. 114 45
Mulligan v. Curtis, 100 Mass. 512 7
Munroe v. Brigham, 19 Pick. 368 455
——— v. Perkins, 9 Pick. 298 434
Murphy v. Gloucester, 105 Mass. 470 94
——— v. Lowell, 124 Mass. 564 310
Murray v. Roberts, 150 Mass. 353 353
Nash v. Minnesota Title Ins. & Trust Co. 159 Mass. 487 577
——— v. Nashua Iron & Steel Co. 62 N. H. 406 190
Nashua & Lowell Railroad v. Boston & Lowell Railroad, 136 U. S. 356 266
National Bank of Commonwealth v. Law, 127 Mass. 72 4
National Ins. Co. v. Pingrey, 141 Mass. 411 375
Nealon v. Henry, 131 Mass. 158 581
Newcomb v. Brackett, 16 Mass. 161 136
New Orleans, Jackson, & Great Northern Railroad v. Harrison, 48 Miss. 112 188
Newton v. Chicago, Rock Island, & Pacific Railway, 66 Iowa, 422, n. 436
Nichols v. Smith, 143 Mass. 455 355
Niles v. Field, 2 Met. 327 80
Nims v. Spurr, 138 Mass. 209 82
Noera v. Williams Manuf. Co. 158 Mass. 110 197
Norcross v. James, 140 Mass. 188 568
Norris v. Morrill, 40 N. H. 395 580
Northrop v. Hill, 57 N. Y. 351 581
Norton v. Doherty, 8 Gray, 372 587
——— v. Piscataqua Ins. Co. 111 Mass. 532 525
Norwood v. New York & New England Railroad, 161 Mass. 259 357
Nowell v. Waitt, 121 Mass. 554 215

O'Connor v. Boston & Lowell Railroad, 135 Mass. 352 7, 342
O'Linda v. Lothrop, 21 Pick. 292 237
O'Loughlin v. Bird, 128 Mass. 600 268
O'Neil v. Glover, 5 Gray, 144 183
O'Neill v. Lynn & Boston Railroad, 155 Mass. 371 153
O'Rourke v. Beard, 151 Mass. 9 313
Osborne v. O'Reilly, 15 Stew. 467 435
Owen v. Neveau, 128 Mass. 427 148

Packard v. Usher, 7 Gray, 529 136
Padelford v. Padelford, 7 Pick. 152 491
Page v. Bent, 2 Met. 371 578
——— v. O'Toole, 144 Mass. 308 321
——— v. Parker, 40 N. H. 47 578
——— v. ———, 43 N. H. 363 581
Paige v. Barrett, 151 Mass. 67 97
Palmer v. Crosby, 11 Gray, 46 81
Palmer's Trademark, In re, 24 Ch. D. 504 195
Panton v. Williams, 2 Q. B. 169 47
Parish v. Stone, 14 Pick. 198 515
Parker v. Abbott, 130 Mass. 25 148
——— v. Nickerson, 137 Mass. 487 431
——— v. Perkins, 8 Cush. 318 324
——— v. Russell, 133 Mass. 74 97
Patch v. Collins, 158 Mass. 468 323
Pawson v. Watson, Cowp. 785 114
Payson v. Burnham, 141 Mass. 547 501
Pearson v. Howe, 1 Allen, 207 578
——— v. Pearson, 27 Ch.D. 145 126
Peck v. Carlton, 154 Mass. 231 466
——— v. Emery, 1 Allen, 463 410

Digitized by Google

Peck v. Requa, 13 Gray, 407 434
Peebles v. Boston & Albany Railroad, 112 Mass. 498 824
Penniman v. Cole, 8 Met. 496 81
People v. Albany & Susquehanna Railroad, 57 N. Y. 161 451
——— v. Doesburg, 16 Mich. 133 451
——— v. Golden Rule, 114 Ill. 84 451
——— v. Keeling, 4 Col. 129 449
——— v. Kohler, 5 Cal. 72 459
——— v. Perkins, 1 Wend. 91 458
——— v. Rensselaer & Saratoga Railroad, 30 Am. Dec. 83 451
——— v. ———, 15 Wend. 113 451
——— v. Richardson, 4 Cowen, 97 450
——— v. Sackett, 14 Mich. 248 451
——— v. Tice, 131 N. Y. 651 431
——— v. ———, 15 Law. Ann. Rep. 669 431
Petersilea v. Stone, 119 Mass. 465 409
Peterson v. Waltham, 150 Mass. 564 78
Pettingell v. Chelsea, 161 Mass. 368 344
Phelps v. George's Creek & Cumberland Railroad, 60 Md. 536 580
Phillips v. Allen, 7 Allen, 115 491
——— v. County Commissioners, 122 Mass. 258 310
——— v. Middlesex, 127 Mass. 262 310
Phœnix National Bank v. Batcheller, 151 Mass. 589 353
Pierrepont v. Loveless, 72 N. Y. 211 19
Pingrey v. National Ins. Co. 144 Mass. 374 375
Pitcher v. Tovey, 4 Mod. 71 563
Plumer v. Lord, 9 Allen, 455 527
Plumley v. Massachusetts, 155 U.S. 461 169
Plympton v. Dunn, 148 Mass. 523 364
Pomeroy v. Westfield, 154 Mass. 462 557
Poole v. Dean, 152 Mass. 587 143
Porter v. Newton, 133 Mass. 56 78
Powers v. Springfield City Council, 116 Mass. 84 358
Pratt v. American Bell Telephone Co. 141 Mass. 225 567
——— v. Weymouth, 147 Mass. 245 346
Pray v. Omaha Street Railway, 44 Neb. 167 536
Prendible v. Connecticut River Manuf. Co. 160 Mass. 131 143, 224
Price v. State, 36 Miss. 531 459
Prince v. Lynn, 149 Mass. 193 346
Prine v. Commonwealth, 18 Penn. St. 103 458
Pritchard v. Norton, 106 U. S. 124 327
Proctor v. Clark, 154 Mass. 45 466
Proprietors of Mills v. Randolph, 157 Mass. 345 321
Puffer v. Orange, 122 Mass. 389 94
Pulsford v. Richards, 17 Beav. 87 581
Purple v. Greenfield, 138 Mass. 1 133
Putnam v. Woodbury, 68 Maine, 58, n. 436

Quincy, Missouri, & Pacific Railroad v. Humphreys, 145 U. S. 82 563
Quinn v. Brennan, 148 Mass. 562 529
——— v. Perham, 151 Mass. 162 211

Railroad Co. v. Hanning, 15 Wall. 649 18
Rammel v. Watson, 2 Vroom, 281 81
Ranlet v. Warren, 7 Mass. 477 82
Raymond v. Butterworth, 139 Mass. 471 215
Rayner v. Preston, 18 Ch.D. 1 505
Reardon v. Thompson, 149 Mass. 267 188
Reedie v. London & Northwestern Railway, 4 Exch. 244 19
Regan v. Boston Gas Light Co. 137 Mass. 37 237
Regina v. Tolson, 16 Cox C. C. 629 458
——— v. ———, 23 Q. B. D. 168 458
Remelee v. Hall, 31 Vt. 582 96
Rex v. Bennett, 1 Strange, 101 450
——— v. Cambridge, 4 Burr. 2010 450
——— v. Higgins, T. Raym. 484 450
——— v. Ladsingham, 2 Keb. 687 458
——— v. ———, T. Raym. 193 458
——— v. ———, Ventris, 97 458
Reynolds v. Nugent, 25 Ind. 328, n. 436
Rice v. King Philip Mills, 144 Mass. 229 275
Richardson v. Boston, 156 Mass. 145 94
——— v. Fisher, 1 Bing. 145 146
——— v. Hazelton, 101 Mass. 108 350
——— v. Smith, 1 Allen, 541 148
——— v. Williams, 49 Maine, 558, n. 436
Richmond Factory Association v. Clarke, 61 Maine, 351 266
Richstain v. Washington Mills, 157 Mass. 538 318
Ridgeway Stove Co. v. Way, 141 Mass. 557 33
Ridley v. Knox, 138 Mass. 83 260
Rindge v. New England Aid Society, 146 Mass. 286 375
Ring v. Neale, 114 Mass. 111 526
——— v. Phœnix Assurance Co. 145 Mass. 426 113, 118, 364
Ritchie v. People, 155 Mass. 98, n. 591
Ritenour v. Mathews, 42 Ind. 7, n. 436
Roberts v. Wentworth, 5 Cush. 192 527
——— v. White, 146 Mass. 256 397
Robertson v. Berry, 50 Md. 591 199
Robinson v. Besarick, 156 Mass. 141 213
——— v. Jewett, 116 N. Y. 40, n. 436
Roby v. Phelon, 118 Mass. 541 261
Rockwell v. Fillmore County, 47 Minn. 219 36
Rogers v. Cromack, 123 Mass. 582 527
——— v. Rogers, 139 Mass. 440 434
——— v. Union Stone Co. 184 Mass. 31 525
Roger Williams National Bank v. Hall, 160 Mass. 171 354
Rooney v. Gillespie, 6 Allen, 74 478
——— v. Sewall & Day Cordage Co. 161 Mass. 153 157, 393
Root v. Bancroft, 8 Gray, 619 581
Ross v. Union Pacific Railway, Wool. 26 566
Rotch v. Emerson, 105 Mass. 431 381
Rowland v. Seymour, 2 Met. 590 80
Rowlandson, Ex parte, 1 Rose, 416 354

Digitized by Google

Rugg v. Barnes, 2 Cush. 591 526
Russell v. Goodrich, 8 Allen, 150 410
——— v. Tillotson, 140 Mass. 201 393
Russia Cement Co. v. Le Page, 147 Mass. 206 197
Rutland & Washington Railroad v. Middlebury Bank, 32 Vt. 639 584
Ryan v. Outagamie Co. 80 Wis. 336 36

Safford v. Slade, 11 Cush. 29 355
Sanborn v. Rice, 129 Mass. 387 501
Sanger v. Newton, 134 Mass. 308 78
Sargent v. Ballard, 9 Pick. 251 340
——— v. State, 11 Ohio, 472 458
Sartwell v. Parker, 141 Mass. 405 47
Savage v. Blanchard, 148 Mass. 348 68
Sawyer v. Harmon, 136 Mass. 414 148
——— v. Levy, 162 Mass. 190 264
Schmidt v. Royal Mail Steamship Co. 45 L. J. (Q. B.) 646 56
Schuchardt v. Allens, 1 Wall. 359 587
Schuler v. Myton, 48 Kans. 282, n. 436
Scotson v. Pegg, 6 H. & N. 295 436
Scribner v. Whitcher, 6 N. H. 63 81
Sears v. Hardy, 120 Mass. 524 513
Seger v. Barkhamstead, 22 Conn. 290 487
Severy v. Nickerson, 120 Mass. 306 188
Seybolt v. New York, Lake Erie, & Western Railroad, 95 N. Y. 562, n. 436
Seymour v. Wilson, 4 Kernan, 567 580
Shadwell v. Shadwell, 30 L. J. (N. S.) C. P. 145 436
Shaffer v. Union Mining Co. 55 Md. 74 591
Shaw v. Stone, 1 Cush. 228 270
Shea v. Massachusetts Benefit Association, 160 Mass. 289 376
—— v. Milford, 145 Mass. 528 67
Sheffield v. Parker, 158 Mass. 330 32
Shepard v. Richardson, 145 Mass. 32 326
Sherman v. Galbraith, 141 Mass. 440 397
Sherwin v. Brigham, 39 Ohio St. 137, n. 436
Short v. Currier, 150 Mass. 372 527
Shurtleff v. Parker, 130 Mass. 293 361
Simonds v. Heard, 23 Pick. 120 67
——— v. Turner, 120 Mass. 328 568
Simpson v. M'Farland, 18 Pick. 427 49, 440
——— v. Trivett, 120 Mass. 147 83, 411
Singer Manuf. Co. v. June Manuf. Co. 41 Fed. Rep. 208 196
——— v. Larsen, 8 Biss. 151 196
——— v. Loog, 8 App. Cas. 15 198
——— v. Riley, 11 Fed. Rep. 706 196
——— v. Stanage, 6 Fed. Rep. 279 196
——— v. Wilson, 2 Ch. D. 434 199
Sistermans v. Field, 9 Gray, 331 385
Slattery v. O'Connell, 153 Mass. 94 7
Smethurst v. Barton Square Church, 148 Mass. 261 429
Smith v. Bowker, 1 Mass. 76 82
——— v. Edgeworth, 3 Allen, 233 385
——— v. First National Bank, 99 Mass. 605 341
——— v. Harrington, 4 Allen, 566 513
Smith v. Livingston, 111 Mass. 342 385
——— v. New York & New England Railroad, 142 Mass. 21 339
Snow v. Alley, 144 Mass. 546 302, 581
——— v. Paine, 114 Mass. 520 580
Somers v. Wright, 115 Mass. 292 291
Southbridge Savings Bank v. Exeter Machine Works, 127 Mass. 542 33
——— v. Mason, 147 Mass. 500 33
Southworth v. Smith, 7 Cush. 391 323
Sparhawk v. Salem, 1 Allen, 30 94
Spaulding v. Knight, 116 Mass. 148 580
Spencer's case, 5 Co. Rep. 16 568
———, 1 Sm. Lead. Cas. 145, n. 568
Spencer, petitioner, 16 R. I. 25 521
Spies v. People, 122 Ill. 1 431
Springfield v. Harris, 107 Mass. 532 311
Spurr v. Scoville, 3 Cush. 578 503
Stanley v. Neale, 98 Mass. 343 527
Stark v. Coffin, 105 Mass. 328 236
Starkie v. Richmond, 155 Mass. 188 239
State v. Bailey, 54 Iowa, 414 433
—— v. Battle, 7 Ala. 259 458
—— v. Bradford, 32 Vt. 50 447
—— v. Brown & Sharpe Manuf. Co. 18 R. I. 11 591
—— v. Cross, 27 Mo. 332 459
—— v. France, 1 Overton, (Tenn.) 434 458
—— v. Gleason, 12 Fla. 190 449
—— v. Hughes, 2 Ala. 102 458
—— v. Hurlbut, 1 Root, 90 458
—— v. Jackson, 82 N. C. 565 418
—— v. Johnson, 26 Ark. 281 452
—— v. Leatherman, 38 Ark. 81 449
—— v. Lewis, 51 Conn. 113 452
—— v. Minnesota Thresher Manuf. Co. 40 Minn. 213 452
—— v. Ober, 52 N. H. 459 431
—— v. Peel Splint Coal Co. 36 W. Va. 802 591
—— v. Sterling, 34 Iowa, 443 418
—— v. Temple, 38 Vt. 37 500
—— v. Wamire, 16 Ind. 357 459
—— v. West Wisconsin Railway, 34 Wis. 197 449
—— v. Winner, 17 Kans. 298 418
—— v. Witham, 72 Maine, 531 431
Stearns v. Hemenway, 162 Mass. 17 20
Stevens, In re, 1 Sawyer, 397 354
———, 5 Nat. Bankr. Reg. 112 354
——— v. Mechanics' Savings Bank, 101 Mass. 109 352
Stewart v. Griswold, 134 Mass. 391 148
——— v. Keteltas, 36 N. Y. 388 435
——— v. Stocker, 13 S. & R. 199 81
Stickney v. Allen, 10 Gray, 352 584
Stimson v. Farnham, L. R. 7 Q. B. 175 527
Stone v. Fowle, 22 Pick. 166 136
——— v. Sanborn, 104 Mass. 319 455
Stuart v. Cambridge, 125 Mass. 102 68
——— v. Wilkins, 1 Doug. 18 587
Sturges v. Theological Education Society, 130 Mass. 414 19
Sturgis v. Cary, 2 Curtis C. C. 382 52

Digitized by Google

Sturtevant *v.* Commonwealth, 158 Mass. 598 228
Sullivan *v.* Boston & Albany Railroad, 156 Mass. 378 495
Sutherland *v.* Wyer, 67 Maine, 64 96
Swan *v.* Drury, 22 Pick. 485 136

Taft *v.* Commonwealth, 158 Mass. 526 340
Tainter *v.* Clark, 5 Allen, 66 514
Tasker *v.* Bartlett, 5 Cush. 359 324
Tay *v.* Ladd, 15 Gray, 296 73
Taylor *v.* Blake, 109 Mass. 513 326
Thacher *v.* Phinney, 7 Allen, 146 580
Thomas *v.* Barnes, 156 Mass. 581 435
——— *v.* Marshfield, 13 Pick. 240 340
Thompson, In re, 3 Nat. Bankr. Reg. 185 180
Thompson *v.* Hamilton, 12 Pick. 425 363
——— *v.* Phenix Ins. Co. 136 U. S. 287 562
——— *v.* Snow, 4 Cush. 121 183
Thomson *v.* Winchester, 19 Pick. 214 197
Thorpe *v.* County Commissioners, 9 Gray, 57 359
Thurston *v.* Cornell, 38 N. Y. 281 580
Thyng *v.* Fitchburg Railroad, 156 Mass. 13 143, 275
Tilt *v.* People, Illinois, March 14, 1895 591
Titus *v.* Boston, 161 Mass. 209 321
Tobey *v.* Chipman, 13 Allen, 123 527
Trumbull *v.* Trumbull, 149 Mass. 200 69
Tryon *v.* Whitmarsh, 1 Met. 1 578
Tucker *v.* Howard, 128 Mass. 361 239
——— *v.* Morrill, 1 Allen, 528 385
——— *v.* Woods, 12 Johns. 190 136
Tucker Manuf. Co. *v.* Boyington, 9 U. S. Pat. Gaz. 455 196
Tully *v.* Commonwealth, 4 Met. 357 541
Turner *v.* Coffin, 12 Allen, 401 527
Turney *v.* Bridgeport, 55 Conn. 412 68
Tuttle *v.* Commonwealth, 2 Gray, 505 228
——— *v.* Cooper, 10 Pick. 281 261
Twombly *v.* Monroe, 136 Mass. 464 244
Tyler *v.* Old Colony Railroad, 157 Mass. 336 133, 344
Tyngelden *v.* Warham, 2 Cal. Ch. liv. 567

Unexcelled Fireworks Co. *v.* Polites, 130 Penn. St. 536 399
Union Bank of Chicago *v.* Kansas City Bank, 136 U. S. 223 562
Union Pacific Railroad, In re, 10 Nat. Bankr. Reg. 178 254
United States *v.* Addision, 6 Wall. 290 451
——— *v.* Cole, 5 McLean, 513 418
United States Trust Co. *v.* Wabash Western Railway, 150 U. S. 287 563
Upton *v.* Suffolk County Mills, 11 Cush. 586 270

Valpy *v.* Oakeley, 16 Q. B. 941 399
Vanderbilt *v.* Schreyer, 91 N. Y. 392, *n.* 436
Van Dorn *v.* State, 34 Fla. 62 451
Van Reimsdyk *v.* Kane, 1 Gall. 371 327
Vernon *v.* Hallam, 34 Ch. D. 748 126
Victorian Railway Commissioners *v.* Coultas, 13 App. Cas. 222 487
Vinal *v.* Tuttle, 144 Mass. 14 411

Walcott *v.* Swampscott, 1 Allen, 101 346
Waldron *v.* Haverhill, 148 Mass. 582 345
Wall *v.* Hinds, 4 Gray, 256 568
Wallace *v.* M'Connell, 13 Pet. 136 266
Walls *v.* Ducharme, 162 Mass. 432 9
Wamsutta Mills *v.* Old Colony Steamboat Co. 137 Mass. 471 62
Ware River Railroad *v.* Vibbard, 114 Mass. 458 49
Warner *v.* Bacon, 8 Gray, 397 97
Warwick *v.* Bruce, 2 M. & S. 205 363
Washburn *v.* Hammond, 151 Mass. 132 254
Wassum *v.* Feeney, 121 Mass. 93 455
Watts *v.* Boston Tow-Boat Co. 161 Mass. 378 318
Webster *v.* Fitchburg Railroad, 161 Mass. 298 246
Weeks *v.* Baker, 152 Mass. 20 323
Weikert, In re, 3 Nat. Bankr. Reg. 27 180
Welch *v.* Adams, 152 Mass. 74 521
——— *v.* Matthews, 98 Mass. 131 136
Weld *v.* Brooks, 152 Mass. 297 340
——— *v.* Williams, 13 Met. 486 69
West *v.* Platt, 127 Mass. 367 167
Westcott *v.* New York & New England Railroad, 152 Mass. 465 572
Wetherbee *v.* Winchester, 128 Mass. 293 482
Wheat *v.* Smith, 50 Ark. 266 452
Wheatland *v.* Silsbee, 159 Mass. 177 324
Wheeler *v.* Bacon, 4 Gray, 550 183
——— *v.* Earle, 5 Cush. 31 13
——— *v.* Train, 3 Pick. 255 439
——— *v.* ———, 4 Pick. 168 440
Wheeler & Wilson Manuf. Co. *v.* Shakespear, 39 L. J. Ch. 36 106
Wheelock *v.* Auditor of Suffolk County, 130 Mass. 486 39
Whipple *v.* Robbins, 97 Mass. 107 266
Whitcher *v.* Shattuck, 8 Allen, 319 107
White *v.* Cutler, 17 Pick. 248 491
——— *v.* Foxborough, 151 Mass. 28 481
——— *v.* Godfrey, 97 Mass. 472 236
——— *v.* Graves, 107 Mass. 325 581
——— *v.* Hill, 148 Mass. 396 254
——— *v.* Provident Savings Assurance Society, 163 Mass. 108 118
Whitney *v.* Boardman, 118 Mass. 242 399
Whitwell *v.* Wells, 24 Pick. 25 49, 440
Wiggin *v.* Boston & Albany Railroad, 120 Mass. 201 455

Digitized by Google

Wight v. People, 15 Ill. 417 451
Williams v. Bosanquet, 1 Brod. & Bing. 238 568
——— v. Brimhall, 13 Gray, 462 73
——— v. Clark, 140 Mass. 238 341
——— v. Osborne, 13 L. T. (N. S.) 498 125
Williamson v. Allison, 2 East, 446 587
Wilmarth v. Burt, 7 Met. 257 82
Wilson, In re, 8 Nat. Bankr. Reg. 396 180
Wilson v. Mower, 5 Mass. 407 486
——— v. State, 2 Ohio St. 319 459
——— v. Steel Edge Stamping & Retinning Co. 163 Mass. 315 393
——— v. Webber, 2 Gray, 558 482
Wilton v. Middlesex Railroad, 107 Mass. 108 536
Wimer v. Worth Township, 104 Penn. St. 317, n. 436
Winchester v. County Commissioners, 114 Mass. 481 78
Windram v. French, 151 Mass. 547 77
Winslow v. Hathaway, 1 Pick. 211 81
Wolcott v. Ely, 2 Allen, 338 148
Wolcott v. Frissell, 134 Mass. 1 594
Wood v. Bullard, 151 Mass. 324 466
——— v. Penoyre, 13 Ves. 325 521
Woods v. Naumkeag Steam Cotton Co. 134 Mass. 357 211
Woodward v. Newhall, 1 Pick. 500 261
Woodworth v. Mills, 61 Wis. 44 167
Worthington, Ex parte, 3 Madd. 26 354
Wrentham v. Norfolk, 114 Mass. 555 357
Wright v. Marwood, 7 Q. B. D. 62 60
——— v. Quirk, 105 Mass. 44 402
——— v. Templeton, 132 Mass. 49 94
Wyeth v. Morris, 13 Hun, 338 582
Wyles v. Beals, 1 Gray, 233 254
Wyman v. Eastern Railroad, 128 Mass. 346 357

Yale v. Saunders, 16 Vt. 243 584
—— v. Wheelock, 109 Mass. 502 261
Yates v. Thomson, 3 Cl. & Fin. 544 327
Young v. Gilles, 118 Mass. 34 408
——— v. Macrae, 9 Jur. (N. S.) 322 196

Zoebisch v. Tarbell, 10 Allen, 385 188

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

JAMES M. USHER & another *vs.* RAYMOND SKATE COMPANY.

Suffolk. November 16, 1894. — January 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Promissory Note — Accommodation Indorsement — Corporation — Mortgage of Personal Property.

A person, who acts upon an incorrect statement by a stranger of the effect of a deed capable of two meanings, is not thereby, without more, in the position of having acted in good faith upon a possible interpretation after reading the instrument.

A mortgage of personal property given to a corporation contained the condition that, if the mortgagor should save the mortgagee harmless "on account of any and all indorsements upon my notes and acceptances, and shall also pay all and any sums of money advanced to me by said company or paid by it on my account, and all sums I may be indebted to it for goods purchased by me of it, within one year from this date," the mortgage should be void. *Held*, that the words "within one year from this date" should not be confined to the words "goods purchased by me of it," immediately preceding, but should be read as applying to all the transactions mentioned.

The fact that a corporation has taken a mortgage of personal property to secure it for its indorsements of the mortgagor's promissory notes within a year from the date of the mortgage, is no evidence of authority on the part of its treasurer, after the year has expired, to indorse in the name of the corporation an accommodation note made by the mortgagor, for the indorsement of which the corporation is not secured.

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CONTRACT, upon a promissory note for $266.30, dated July 5, 1891, payable four months after date to the order of the plaintiffs, signed "Geo. J. Raymond & Co.," and indorsed "Raymond Skate Co., per J. M. Raymond, Treasurer." The declaration alleged that the note was made by "Hattie D. Raymond, then doing business under the firm name and style of George J. Raymond & Co." Answer: 1. A general denial. 2. That the note was given without consideration and without the authority or knowledge of the defendant, solely for the accommodation of George J. Raymond and Company; and that the plaintiffs knew these facts at the time the note was made.

Trial in the Superior Court, before *Blodgett*, J., who reported the case for the determination of this court, in substance as follows.

The genuineness of the signature to the note, and the fact that J. M. Raymond was treasurer of the defendant, were admitted. It appeared in evidence that the defendant had due notice of the non-payment of the note by the maker; that the consideration of the note was goods sold by the plaintiffs to Hattie D. Raymond, who was then doing business under the firm name of George J. Raymond and Company; and that the note was given by Hattie D. Raymond with the indorsement of the defendant thereon to the plaintiffs in payment for said goods. One of the plaintiffs testified that they were informed, at the time they received the note, by George J. Raymond, the husband and agent of Hattie D. Raymond, and who was managing the business of the firm of George J. Raymond and Company, that the defendant held a mortgage from Hattie D. Raymond to secure it for its indorsements; and it was contended by the plaintiffs at the trial that they accepted the note in payment for the goods sold to George J. Raymond and Company upon the above statement of George J. Raymond. It also appeared that they had learned that such was the fact at a mercantile agency.

George J. Raymond, called as a witness by the defendant, testified that he did not inform the plaintiffs that the defendant held security for the indorsement from Hattie D. Raymond; that the indorsement of the defendant was made at the request

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of the plaintiffs, to enable them to get the note discounted; and that they could not get the note discounted without an additional name upon it. The plaintiffs denied this testimony. On cross-examination, the witness testified that Hattie D. Raymond had, prior to the indorsement upon the note in suit, given a mortgage to the defendant to secure it for its indorsement upon the paper of George J. Raymond and Company, and that the mortgage was discharged prior to the indorsement upon the note in suit. The plaintiffs then introduced in evidence a copy of a mortgage from Hattie D. Raymond, doing business under the name of George J. Raymond and Company, to the defendant; and also evidence that the mortgage had not been cancelled upon the records. The mortgage, which was dated January 17, 1890, was given by Hattie D. Raymond, doing business under the name of George J. Raymond and Company, to the defendant, and covered "all the goods and merchandise, stock and fixtures," in certain stores in Boston; and contained, among others, the condition that, if the mortgagor should save the mortgagee harmless "on account of any and all indorsements upon my notes and acceptances, and shall also pay all and any sums of money advanced to me by said company or paid by it on my account, and all sums I may be indebted to it for goods purchased by me of it, within one year from this date," the mortgage should be void.

It appeared in evidence that the defendant was a manufacturing corporation, organized for the purpose of manufacturing and selling roller skates and other articles, and engaged in the manufacture and sale of the same; and that, by the by-laws of the defendant, its treasurer had no authority to make or indorse promissory notes, and no authority was shown from the directors of the corporation.

At the close of the evidence, the defendant asked the judge to rule that, upon all the evidence in the case, the plaintiffs were not entitled to maintain their action. The judge so ruled; and directed the jury to return a verdict for the defendant.

If, upon the foregoing testimony, there was any evidence on which the jury could have found for the plaintiffs, the verdict was to be set aside, and a new trial ordered; otherwise, judgment was to be entered for the defendant.

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H. P. Harriman & F. J. Daggett, for the plaintiffs.

R. Lund, (*C. H. Welch* with him,) for the defendant.

HOLMES, J. The plaintiffs took the note in suit with knowledge that the defendant's treasurer indorsed it for the accommodation of the maker, at least unless the statement alleged to have been made to them that the defendant held a mortgage from the maker to secure it was true. Unless that statement was true, therefore, they had notice that in the absence of actual authority the defendant's treasurer had no right to indorse the note. See *Monument National Bank* v. *Globe Works*, 101 Mass. 57; *National Bank of Commonwealth* v. *Law*, 127 Mass. 72, 75; *Davis* v. *Old Colony Railroad*, 131 Mass. 258; *Bank of Genesee* v. *Patchin Bank*, 3 Kernan, 309, 314; *Ex parte Estabrook*, 2 Lowell, 547, 548. The plaintiffs can stand no better than they would have stood had the mortgage been exhibited to them. The husband of the maker was not an agent of the defendant, and his representation did not affect the defendant's liability except so far as it was true. The fact of the mortgage coupled with the plaintiffs' knowledge of it, however obtained, was the only thing which concerned the defendant. If the mortgage had been exhibited to the plaintiffs, they would have seen that it ran only for transactions within a year from its date, and that that time had expired. It is true that a question might be made whether the words "within one year from this date" in the mortgage should be confined to the words "goods purchased by me of it," immediately preceding, but the good sense of the thing shows that the limitation should be read as general, and as applying to all the transactions mentioned. There is no sufficient reason for leaving the mortgage indefinite in time as to indorsements, while it is limited to a year in respect of purchases. The plaintiffs are not in the position of having read the instrument, and of having acted *bona fide* upon the other interpretation. *Crossan* v. *New York & New England Railroad*, 149 Mass. 196, 198, 199. They took their chances on the statement of a stranger.

It follows that the plaintiffs are not helped by the statement alleged to have been made to them. Assuming the corporation to have accepted the mortgage, such a transaction for a time that had passed was no evidence of subsequent authority on the

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part of its treasurer to indorse accommodation paper for the indorsement of which the corporation was not secured, and it is not necessary to consider whether it would have been sufficient for a note indorsed within the time, or whether such an indorsement would have been within the powers of a corporation organized for the purpose of manufacturing and selling roller skates and other articles. *Judgment for the defendant.*

EDWARD POWERS, administrator, *vs.* QUINCY AND BOSTON STREET RAILWAY COMPANY.

Norfolk. November 23, 1894. — January 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Loss of Life — Street Railway — Child — Due Care of Parent — Law and Fact.

A boy two years and eight months old lived with his parents in a house on a place, so called, about two hundred feet distant from a street upon which an electric railway ran. There was a yard outside of the house enclosed by a fence with a gate opening from it into the place, and on the gate was a catch to fasten it, and also a rope, sometimes used for the same purpose. There were older children in the family, who attended school, and who had been instructed to fasten the gate whenever they passed in or out. One of them, a girl seven years old, who once had been punished by her mother for leaving the gate open, went out of the house after dinner into the yard on her way to school, and left the gate open as she passed out. The boy followed her from the house into the yard, and went out upon the street, where he was run over and killed by an electric car. His mother, who was engaged in her household work, saw him follow his sister out of the house, and learned of the accident ten or fifteen minutes afterwards. *Held*, in an action against the railway corporation for causing his death, that it was a question of fact for the jury whether the mother was reasonably careful in allowing the boy to go out into the yard alone, and in not watching him after he went out.

TORT, by the administrator of the estate of Joseph Powers, for causing his death. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. I. Badger, for the defendant.

J. E. Cotter, (*J. W. McAnarney* with him,) for the plaintiff.

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KNOWLTON, J. The only question argued by the defendant is whether there was evidence to submit to the jury in favor of the plaintiff on the question whether his intestate was in the exercise of due care. He was a child two years and eight months old. He lived with his parents and four sisters, the eldest of whom was fifteen years of age, in a house on Franklin Place in Quincy, about two hundred feet westerly from the line of Franklin Street. He was run over and killed by one of the defendant's electric cars on Franklin Street soon after one o'clock in the afternoon. There was evidence of negligence on the part of the motorman in charge of the car. The child was too young to be capable of taking care of himself on a public street. He was in the custody of his mother before he escaped and went upon the street, and the burden was on the plaintiff to show that she was in the exercise of due care in reference to his safety.

The evidence tended to show that the plaintiff was a laborer, and that his wife, the boy's mother, took charge of the house and did the household work for the family. On the day of the accident she was busy providing dinner for her daughters, who had come home from school, and for her husband, who came from his work and had his dinner a little later than the others. There was a yard outside of the house enclosed by a fence, with a gate opening from it into Franklin Place. On the gate was a catch to fasten it, and also a rope sometimes used for the same purpose. The children were instructed to fasten the gate whenever they passed in or out. The plaintiff's intestate had been playing in the enclosed yard in the forenoon of the day of his death. His sister Margaret, then seven years and four months old, went out of the house after dinner into the yard on her way to school. She had been instructed to close the gate whenever she opened it, and once had been punished by her mother for leaving it open. The mother saw the little boy follow his sister Margaret out of the house into the yard. Margaret left the gate open as she started for school, and the boy followed her, and went into Franklin Street and was run over. It was testified that the mother heard of the accident ten or fifteen minutes after she saw the boy go out of the house.

We are of opinion that it was a question of fact for the jury whether the mother was reasonably careful in allowing the boy

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to go out into the yard alone, and in not watching him after he went out. The jury might find that she had good reason to believe that he was safe in the yard and that he could not escape. They might well find that the care she gave him was all that could reasonably be required of her under the circumstances. The nature of the evidence was such as to present a question of fact, and not a question of law. *Mulligan* v. *Curtis*, 100 Mass. 512. *Gibbons* v. *Williams*, 135 Mass. 333. *O'Connor* v. *Boston & Lowell Railroad*, 135 Mass. 352. *McGeary* v. *Eastern Railroad*, 135 Mass. 363. *Slattery* v. *O'Connell*, 153 Mass. 94, 96. *Creed* v. *Kendall*, 156 Mass. 291. *Marsland* v. *Murray*, 148 Mass. 91. *Exceptions overruled.*

AMOS C. BORDEN & another *vs.* WILLIAM L. MERCER.

Middlesex. November 23, 1894. — January 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Mechanic's Lien — Exceptions — Statement of Account — Consent of Owner — Worth of Labor.

If the statement of account filed by a person seeking to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under a contract for labor and materials in the erection of a house, sets out the amount due, which the court finds to be the true amount, it is no objection to the statement that it does not set out the contract price or the credits to be allowed for materials to the person with whom the petitioner contracted, it being admitted that there was no intention to mislead, and it being found by the court that the party entitled to notice of the statement was not misled by it, as provided for in St. 1892, c. 191, amending Pub. Sts. c. 191, § 6.

A. held an agreement from B. to sell him the land on which a building was being erected by A., on condition that the latter should complete the building at his own expense and in his own behalf, B. making the advances for that purpose, which were to be paid back before the land was conveyed. C. made with A. a sub-contract to furnish labor and materials in the erection of the house. B. saw C. at work, and afterwards told him that he had given A. the money to pay him. *Held*, upon a petition by C. against B. to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under his sub-contract, that this agreement was with the consent of the owner of the building, within § 1.

A finding of the judge upon the trial of a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under a contract in the erection of a house, that the labor was reasonably worth what was charged for it, disposes of

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a request for a ruling which was refused, that the petitioner could not charge a profit on his own labor, or on the labor which he furnished, above the amount which he actually paid for the labor, or which was the going price of that class of labor.

HOLMES, J. This is a petition to enforce a mechanic's lien for labor furnished under a sub-contract for labor and materials in the erection of a house. The case comes before us on exceptions to the refusal of certain rulings, which we will deal with in their order.

1. The first was to a refusal to rule that on the whole evidence the petitioners could not maintain their lien. As this exception is not supported by any arguments except those addressed to the more specific rulings asked, we shall not discuss it separately.

2. The next ruling asked was that the certificate was defective. The defects relied on are that it did not set out the contract price, or the credits to be allowed for materials to the parties with whom the petitioners contracted. It was admitted that there was no intention to mislead, and the court found that the parties entitled to notice of the statement were not misled by it; so that the case is within the words and meaning of St. 1892, c. 191, amending Pub. Sts. c. 191, § 6, as to the contract price. The certificate purported to set out, and did set out, a "true account of the amount" due the petitioner, "with all just credits given," if that is necessary in a case of this sort. It stated the amount due to be $149.50, and the judge has found that amount to be due. Any inaccuracy would have been cured by Pub. Sts. c. 191, § 8.

3. The third ruling requested was that the agreement made by the petitioners with Hunniwell and Newton, the intervening contractors, was not with the consent of the owner of the building, within Pub. Sts. c. 191, § 1. Hunniwell and Newton held an agreement from the defendant to sell them the land on which the building stood, on condition that they should complete the building at their own expense and on their own behalf, the respondent making the advances for that purpose, which were to be paid back before the land was conveyed. This agreement is not to be distinguished from those agreements which have been held to import consent in the many cases which have been before this court. *McCue* v. *Whitwell*, 156 Mass. 205. *Carew* v.

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Stubbs, 155 Mass. 549, 551. Although Hunniwell and Newton were to complete the building on their own behalf, they were not required to do all the work personally. Furthermore, if it were necessary to rely on other evidence, the respondent saw the petitioners at work, and afterwards told them that he had given Hunniwell and Newton the money to pay them.

4. The last ruling requested and refused was that the petitioners could not charge a profit on their own labor, or the labor which they furnished above the amount which they actually paid for the labor, or which was the going price of that class of labor. This ruling was asked with reference to evidence that the going price for tenders was $2.50 a day, and for plasterers $3.50, and that the petitioners paid these prices. The judge found that the labor was reasonably worth what was charged for it. The statute in terms gives a lien for labor furnished, as well as for labor performed, §§ 1, 2, 6, and under contracts like that of the petitioners requires it to be ascertained what the labor was worth, § 2. The finding of the judge disposes of the request. But labor furnished may be worth more than is paid to the laborer, even if the laborer is paid the going rate, or a reasonable price. *Hyde* v. *Moxie Nerve Food Co.* 160 Mass. 559, 560. In *Walls* v. *Ducharme*, 162 Mass. 432, the difference between the sum paid and the sum charged was very great, and the question was whether there was evidence that the petitioner knowingly claimed more than was due.

Exceptions overruled.

R. W. Light & C. F. Light, for the respondent.

C. B. Loud, for the petitioners.

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STANDARD BUTTON FASTENING COMPANY *vs.* FRANCIS W. BREED.

Suffolk. November 23, 1894. — January 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Lease of Machine — Construction of Contract — Penalty — Damages.

The owner of certain machines for sewing buttons let them to another under a written instrument, by the terms of which the lessee agreed to keep an account of the number of buttons sewed, and to pay for the use of the machines at the rate of twelve cents a thousand. The instrument then provided that, if the lessee failed to keep and render such an account, the lessor might at his option either employ a person to keep the account, "or the lessor may, if he prefers, charge said lessee, in lieu of said twelve cents per thousand, the sum of five dollars per day for each of said machines while and so long as said lessee shall fail or neglect to render accounts of the number of buttons as above provided, and in either case said lessee hereby agrees to pay the reasonable compensation of such person employed as above specified, or to pay to the lessor the full price per day for said machines, as above agreed." *Held*, in an action upon the instrument, that the provision for payment at the rate of five dollars a day was not a penalty, but such rate was the estimated equivalent of what would be due by account for the time when the lessee failed to keep an account; and that judgment was to be entered upon the basis of such rate.

HOLMES, J. This is an action of contract to recover for the use of certain machines for sewing buttons, at the rate of five dollars a day, under a written instrument. The only question before us is whether the provision for the payment at that rate is merely a penalty, or whether it raises a duty to pay at that full rate in the contemplated event which is admitted to have happened. The lessee or licensee agrees to keep an account of the number of buttons sewed, and to pay at the rate of twelve cents a thousand. The agreement then goes on as follows: "And if said lessee shall fail or neglect to keep an account of all the buttons sewed on by him, or by any person for him, and to render to the lessor a true account of same as above provided, then the lessor may, at his option, either employ some suitable person to enter and remain upon the premises when said machines are operated, and keep an account of the number of buttons sewed on boots, shoes, or fabrics by said machines, or the lessor may, if he prefers, charge said lessee, in lieu of said

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twelve cents per thousand, the sum of five dollars per day for each of said machines while and so long as said lessee shall fail or neglect to render accounts of the number of buttons as above provided, and in either case said lessee hereby agrees to pay the reasonable compensation of such person employed as above specified, or to pay to the lessor the full price per day for said machines, as above agreed."

The first of the two courses between which the plaintiff is given a choice is not a penalty, but merely another way of fixing the price, although the choice is given to the plaintiff only in case of a breach of agreement by the lessee. When the plaintiff, instead of being at the trouble and cost of employing a person to keep the account, is allowed to charge a fixed rate per diem, the natural inference is that the rate is a roughly estimated equivalent. There is nothing to control this interpretation. It was assumed, no doubt, that the machines would be in active use. The difference between the sum which would be due by account ($700) and that which is due charging by the day ($1,000), although appreciable, is not so great as to lead to a different conclusion. Probably it is greater than was expected by the parties when they signed the instrument. If the plaintiff had employed a person to keep the account, the expense would have been added to the seven hundred dollars. Payment by the day is a liability attached to the single case of a failure to keep and render a true account, and is required only for such time as the failure lasts. It has none of the characteristics of a penalty, and in our opinion it is not one.

It is agreed that judgment shall be entered for the plaintiff for $705.36 or $1,005.36, with interest, according to the opinion of the court on the question discussed. The Superior Court ordered judgment for the larger sum.

Judgment affirmed.

C. A. Taber, for the defendant.

G. E. Smith, for the plaintiff.

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LOUIE A. MILLER, administratrix, *vs.* MARGARET A. F. PRESCOTT.

Suffolk. December 12, 1894. — January 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Landlord and Tenant — Breach of Covenant in Lease — Waiver of Breach.

An unlawful use of premises by a sub-tenant is a breach of the covenant in a lease of the premises not to "make or suffer" any unlawful use of the premises, whether known by the lessee or not.

The acceptance, after the breach of a covenant in a lease of premises known to the lessor, of rent already accrued, accompanied by an express agreement that the breach is not thereby waived, does not affect the right of the lessor to enter for such breach.

EJECTMENT, by the administratrix with the will annexed of the estate of Herbert W. Miller, to recover the residue of a term of a lease, made by the defendant to the testator, of certain premises on Howard Street in Boston, and damages for withholding the same. Trial in this court, before *Holmes*, J., who, at the plaintiff's request, reported the case for the consideration of the full court. If either of certain rulings was wrong, there was to be a new trial; otherwise, judgment was to be entered for the defendant. The facts sufficiently appear in the opinion.

W. C. Wait, for the plaintiff.

W. D. Turner, for the defendant.

KNOWLTON, J. The plaintiff's testator, who was the lessee of the real estate described in the writ, entered into a covenant not to "make or suffer any waste, or any unlawful, improper, or offensive use of the said premises." By the terms of the report, judgment was to be entered for the defendant unless there was error in one of the two following rulings: first, "that unlawful use of the premises by a sub-tenant was a breach of the covenants and conditions of the lease, whether known by the plaintiff or her testator or not"; secondly, "that if the rent for the months in question was paid over and received according to the receipts put in evidence marked Exhibit 2, that would not amount to a waiver of breaches then known to the defendant." On these receipts for accrued rent was the following indorsement:

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"The receipt of this rent is not to waive any breach of the covenant and conditions of the lease on the Howard Street estate."

The covenant referred to is a covenant concerning land, and affecting the mode of enjoyment of it. Such a covenant runs with the land, and is binding upon persons who are in privity of estate with the covenantee. It is intended for the protection of the lessor, and he may enforce it directly against the original lessee or against an assignee of the lease. If there is no assignment of the lease, but a subletting of the whole or a part of the premises for a time less than the remainder of the term, so that no privity of estate is created between the lessor and the sub-tenant, the covenant would be ineffectual for the lessor's protection if he could not proceed on the ground that it applies as well to an unlawful use by a sub-tenant as by the original lessee. We are of opinion that the agreement not to "make or suffer" an unlawful use of the premises must be interpreted as a stipulation that there shall be no unlawful use by the original lessee, or by any person who is occupying under him. It is easy for the lessee to control the use of the property, and to protect the interests of the lessor and of himself in this particular. With this interpretation effect is given to the word "suffer." It may not be reasonable to hold that the covenant makes the lessee liable for an unlawful use of the property by trespassers; but he may well be held to "suffer" an unlawful use of the property if he does not take effectual measures to prevent such a use by those who occupy by his authority. The adjudication in *Wheeler* v. *Earle*, 5 Cush. 31, fully covers the ruling now in question.

The acceptance of rent already accrued, accompanied by an express agreement that the breach of condition was not thereby waived, did not affect the right of the lessor to enter for a breach of the condition. *Kimball* v. *Rowland*, 6 Gray, 224. There was nothing necessarily inconsistent between the acceptance of rent due and the enforcement of the right to enter. There was no error in the rulings at the trial.

Judgment for the defendant.

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ELLEN M. HARDING *vs.* CITY OF BOSTON.

Suffolk. December 13, 1894. — January 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trespass upon Land — Contract for Construction of Sewer — Independent Contractor — Liability of City.

A. entered into a written contract with a city for the construction of a sewer, according to plans and specifications which were furnished in advance for the entire work. A. was to do the work with his own men, and to have it done by a certain date. The work was to be done "to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times"; and the power to him or the inspector in charge of giving directions as to the work in certain particulars was provided for. The contract also provided that "none but citizens of" the city were "to be employed on this work." *Held*, in an action by an abutter against the city for trespass upon his land, that A. was an independent contractor, for the negligence of whose men in doing the work the city was not liable.

A. made a written contract with a city for the construction of a sewer in a certain street. The contract provided that the city should furnish the brick to A. The city accordingly made a contract with B. to supply the brick, which was to be delivered "upon the work on the line of the sewer." B. unloaded the brick on C.'s wharf and carted them across C.'s land, which abutted on the street in question, and delivered them to the city at the place agreed upon. There was no arrangement between B. and any one representing the city that B. should use C.'s wharf or cross his land in delivering the brick. *Held*, in an action by C. against the city for trespass, that the city was not responsible for B.'s acts.

TORT, for trespass upon the plaintiff's land and wharf, with a count in contract. Trial in the Superior Court, before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff introduced evidence tending to show that in the year 1886 the board of aldermen of the defendant city, by an order duly passed, and approved by the mayor on June 28, 1886, laid out a common sewer through Granite Avenue, Adams Street, and Minot Street, which sewer became when constructed the property of the city.

On June 30, 1886, the city entered into a contract for the construction of the sewer with John A. Gill, which contract was introduced in evidence by the plaintiff, and provided, among other things, that the contractor was "to furnish all the materials except as hereafter specified, and do all the work according to the

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plans and specifications" set out; that the excavation was to be made true to the line and grade as given to the contractor, and, if the material was unsuitable for forming the bottom, a further depth was to be excavated "as directed by the superintendent or inspector in charge"; that only such length of trench was to be opened at once "as directed by the inspector"; that the earth excavated was "to be compactly placed along the trench, so as to be as little annoyance as possible to abutters, . . . and no obstruction to be placed upon the sidewalks"; that the trenches and banks were to be kept lighted and fenced as provided in the city ordinances, "and the contractor to be responsible for all damages arising from, or in consequence of, the construction of the sewer"; that all sewers or drains were to be connected with the work "as directed by the superintendent or inspector"; that the earth should be removed and the street cleaned up as the work proceeded, "to the satisfaction of the inspector"; that certain notice should be given by the contractor to any railroad corporation before entering on its location, "and every provision for safety required by them, or by the inspector, must be complied with"; that certain notice should also be given to any street railway corporation, in crossing or in opening trenches beneath its tracks, and the work performed so as to permit the passage of cars, "unless by special direction of the superintendent"; and that the work was to be finished by a date named.

The contract also contained the following clauses:

"The work to be kept perfectly clean from dirt, brick-bats, etc., as built, and the whole done to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times. . . .

"None but citizens of Boston to be employed on this work, and the contractor to whom this contract is awarded must agree to comply with this rule. . . .

"The city will furnish as near the line of the work and in such quantities as practicable all the bricks, cement, pipes, and branches, manhole and catch-basin curbs and covers, and slants."

The work of constructing the sewer was begun soon after the date of the contract.

The plaintiff was in 1886, and at the time of the acts complained of, the lessee of three undivided fifths of a lot of land,

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part of which consisted of a wharf adjoining Granite Avenue on the easterly side, being the land described in the declaration, and owner in fee of the remaining two undivided fifths thereof. There was evidence tending to show that, in the course of the construction of the sewer in Granite Avenue in the summer and fall of 1886, large quantities of material excavated from the trench, consisting of rock and gravel, were thrown and deposited on the line of the same by the men at work in the trench. The location of the easterly line of Granite Avenue was in controversy at the trial; but the evidence for the plaintiff tended to show that the material so excavated was thrown upon and also spread beyond said easterly line, as it was claimed by the defendant, to and over some of the plaintiff's land. A portion of the material excavated from the trench was left where it was originally deposited, and was described as forming, at the time of the trial, a pile about fifty feet long in the longest part, and about twenty-five feet wide; originally, it was somewhat larger. There was evidence that large quantities of water were pumped from the sewer trench, which went on to the estate of one Mullen, and ran from there upon land claimed by the plaintiff to be part of her estate, and across that estate to the river; and that bricks used in the construction of the sewer were landed upon the plaintiff's wharf.

Thomas J. Young, called as a witness by the plaintiff, testified that he was superintendent of sewers of the defendant city in 1886; that, in the exercise of his duties as such superintendent under the contract with Gill, he visited the place of the work in Granite Avenue from three to five times a week; that there were officers under him, the chief engineer of the department and two inspectors, and these officers were present, under the terms of the contract, at different times while the work was going on, from July, 1886, to March, 1887; that he saw Gill and his men putting the earth upon the lines of the sewer in the place where they did put it; and that he saw no reason to, and did not, stop them, and did not think that he had any right so to do.

Granite Avenue opposite the plaintiff's land was laid out three rods wide. The sewer trench was a little easterly of the middle line of the street, on the side nearest the plaintiff's land, the westerly side of the street being reserved for travel during the

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construction of the sewer. Young testified further, that Gill might have carted the rubble excavated away from the ditch, and carted it back again, or he might have piled it a great deal higher than he did, covering a smaller space of ground; that he should think these were all the courses open to him; that it could not be carted back along the street and deposited on the street; that there was surplus material deposited on the street then from the part of the sewer which had been completed; that about four fifths of the material excavated went back into the trench; that it was a very deep cut there; and that the material took up nearly all of the street.

In pursuance of the obligations on the part of the defendant under the contract to furnish the brick to the contractor, the city made a contract with the firm of Ham and Carter to furnish a quantity of brick to be delivered upon the work on the line of the sewer, and Ham and Carter unloaded such brick on the plaintiff's wharf and carted them with teams from the wharf across the plaintiff's land to Granite Avenue, and delivered them to the city upon the work on the line of the sewer. It did not appear that there was any arrangement between Ham and Carter and any one representing the city that Ham and Carter should use the wharf or cross the plaintiff's land in delivering the brick; but it did appear that such use was known to the superintendent of sewers, that no objection was made by him to such use, and that at the time the work on the sewer was commenced he talked with one Pierce about unloading brick on that wharf. There was evidence that some of the brick landed on the wharf were sold and delivered by Ham and Carter to other parties in the neighborhood.

Upon the foregoing evidence, the judge ruled that the defendant was not liable for the trespasses complained of; and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

G. S. Hale & W. Schofield, for the plaintiff.

A. J. Bailey & F. E. Hurd, for the defendant.

ALLEN, J. The plaintiff's count in contract may be disregarded, there being no evidence to support it; and no question was saved in regard to it.

The count in tort was for trespass upon the plaintiff's land,

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consisting of or resulting from acts done by Gill and his men, and by Ham and Carter. The only question is whether there was any evidence to show that the city was responsible for those acts, or for any of them. In our opinion there was not.

Gill was a contractor, and he made a written contract with the city for the construction of certain sewers. The work to be done was settled in advance, and was to be according to plans and specifications which were furnished in advance for the entire work. The work was of a kind which did not necessarily or naturally involve any injury to the plaintiff's land. Such injury was not within the reasonable contemplation of the defendant. The city did not employ the workmen or laborers, and had no power to dismiss them. The contractor was to do the work with his own men, and to have it done by a certain date. The work was to be done to the satisfaction and acceptance of the defendant's agent, and supervision and superintendence were provided for, and the power of giving directions as to the work in certain particulars. These provisions appear to us to go no further than to enable the city to secure the proper performance of the work, and do not show that Gill and his men were servants of the city. *Kelly* v. *New York*, 1 Kernan, 432. *Erie* v. *Caulkins*, 85 Penn. St. 247. *Erie School District* v. *Fuess*, 98 Penn. St. 600. The directions which the superintendent of sewers and the inspector might give were in order that certain results should be accomplished, and did not enable those officers to take the control and direction of Gill's men. Gill was still the contractor, in the responsible charge of his men. Looking at the contract as a whole, we think it clear that he should be regarded as an independent contractor, for the negligence of whose men the city was not responsible.

An examination of the cases cited does not show any decision which appears to be in conflict with this view. Cases have often arisen, in this State and elsewhere, in which the general question has been considered, and in some of them the distinction is rather nice. The relation of master and servant was held to exist in *Linnehan* v. *Rollins*, 137 Mass. 123; *Brooks* v. *Somerville*, 106 Mass. 271; *Brackett* v. *Lubke*, 4 Allen, 138; and *Railroad Co.* v. *Hanning*, 15 Wall. 649; and was held or found not to exist in *Conners* v. *Hennessey*, 112 Mass. 96; *Forsyth* v.

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Hooper, 11 Allen, 419; *Hilliard* v. *Richardson*, 3 Gray, 349; *Pierrepont* v. *Loveless*, 72 N. Y. 211; *Harrison* v. *Collins*, 86 Penn. St. 153; and *Reedie* v. *London & Northwestern Railway*, 4 Exch. 244. In some cases, other considerations came in, so that the decisions did not rest on the law of master and servant; as, for example, cases where one was under a statutory obligation in respect to the thing to be done, or where the work was intrinsically dangerous, so that in the natural course of things injurious consequences must have been expected to result. Such cases are to be distinguished. *Gray* v. *Pullen*, 5 B. & S. 970. *Bower* v. *Peate*, 1 Q. B. D. 321. *Hole* v. *Sittingbourne & Sheerness Railway*, 6 H. & N. 488. *Hughes* v. *Percival*, 8 App. Cas. 443. *Joliet* v. *Harwood*, 86 Ill. 110. So where, after the acceptance of the completed work, an injury occurs because it was badly done, the owner, having accepted the work, is thenceforth responsible, on the ground, perhaps, that he is maintaining a nuisance. *Sturges* v. *Theological Education Society*, 130 Mass. 414. *Gorham* v. *Gross*, 125 Mass. 232. *Cork* v. *Blossom*, 162 Mass. 330.

The present case is governed by the law so often applied when work has been done through the employment of an independent contractor. The provision in the contract that none but citizens of Boston were to be employed on the work did not give to the city the selection of the laborers in any such sense as to make them its servants.

Nor is the city responsible for the acts of Ham and Carter in leaving brick upon the plaintiff's wharf, or in carting the brick across the plaintiff's land. By their contract with the city, they were to deliver the brick "upon the work on the line of the sewer," and there was no evidence that there was any arrangement between them and any one representing the city that they should use the plaintiff's wharf, or cross her land in delivering the brick. The city is not responsible for their trespass upon the plaintiff's wharf and land.

Exceptions overruled.

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BOSTON WALL PAPER COMPANY *vs.* JAMES F. MULLEN.

Suffolk. December 14, 1894. — January 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Poor Debtor — Recognizance — Statute.

A poor debtor recognizance, requiring the principal defendant to deliver himself up "for examination before some magistrate authorized to act," is to be construed as if it required the debtor to deliver himself up for examination before some court or magistrate named in St. 1888, c. 419.

CONTRACT, against a surety upon a poor debtor's recognizance. At the trial in the Superior Court, before *Hammond*, J., the defendant asked the judge to rule that the recognizance was void because the condition thereof was not in accordance with Pub. Sts. c. 162, and acts in amendment thereof, in that the debtor was required to deliver himself up "for examination before some magistrate authorized to act," instead of a court; but the judge declined so to rule, and held that the recognizance was valid and binding, and ordered judgment for the plaintiff. The defendant alleged exceptions.

W. O. Kyle, for the defendant.

W. B. French, for the plaintiff.

ALLEN, J. The ruling was right. *Stearns* v. *Hemenway*, 162 Mass. 17.

Exceptions overruled.

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JOSEPH N. WALCOTT *vs.* JEREMIAH O'CONNOR.

Suffolk. November 28, 1894. — January 5, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trial — Mistake of Clerk of Court — Negligence of Attorney.

The docket of the Superior Court showed that the defendant in an action duly claimed a trial by jury, but the clerk of the court by mistake put the case upon the jury waived list. About a month before the case was reached for trial on that list, the defendant's counsel made some search for, but was unable to find, the notice that the defendant claimed a trial by jury, and believed that his clerk had not given the notice. He made no motion to transfer the case to the list of cases for trial by jury, but proceeded to a trial without a jury. After the trial, and before the finding of the judge had been formally made and entered, the notice was found among the files of the case; and thereupon the defendant asked the judge to transfer the case to the list for trial by jury. The judge refused so to do, and found for the plaintiff. *Held*, that the defendant had no ground of exception.

CONTRACT, against the surety upon a poor debtor's recognizance. Trial in the Superior Court, without a jury, before *Bond*, J., who found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. L. Powers, for the defendant.

F. W. Adams, for the plaintiff.

FIELD, C. J. The docket showed that the defendant duly claimed a trial by jury, but the clerk of the court, by mistake, put the case upon the jury waived list. The defendant's counsel, about a month before the case was reached for trial on the jury waived list, made "some search for the defendant's notice that he claimed a jury trial without finding it, and believed thereafter that his clerk had not given the said notice." The notice was found among the papers at the time of the trial. The defendant made no motion to transfer the case to the list of cases for trial by a jury, but proceeded to a trial of the case by the court without a jury. After the trial, and before the finding of the court "had been formally made and entered, the defendant's claim for a trial by jury was noticed by the justice with the files, and the attention of counsel was called to it, and there-

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upon the defendant asked the court to transfer the case to the jury list," which the court refused to do. To this refusal the defendant excepted. The finding of the court was for the plaintiff. The defendant with his counsel went to trial before the court held without a jury, without making any objection to such a trial. The counsel intimates that he was induced to do this because he believed that he had not given notice that he desired a trial by jury. An examination of the docket of the court would have shown that he had given such notice, and the notice was among the papers at the time of the trial. So far as the defendant's counsel, in proceeding without objection to trial before the court without a jury, acted under a mistake of fact, it was a mistake of a fact relating to his own conduct, which was induced, not by the other party to the suit, but by the clerk of the court, and it was apparently a mistake which a careful examination of the docket or of the papers in the case would have disclosed. Certainly the court, in declining to grant the defendant's motion "so far as it was a matter of discretion," may have found that it was due to the carelessness of the defendant or his counsel that the mistake of putting the case on the jury waived list was not discovered.

The defendant, through his counsel, having assented to a trial without a jury, ought not afterwards to avoid this by showing that his counsel made a mistake about a fact relating to his own conduct in the case, which due diligence on his part would have corrected.

Exceptions overruled.

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CARRIE K. SLOCUM & others *vs.* SELECTMEN OF BROOKLINE.

Norfolk. November 15, 1894. — January 8, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Sewer — Validity of Assessment — Laying out of Sewer.

So far as an assessment, under Pub. Sts. c. 50, § 7, for the cost of constructing a sewer is concerned, it is unnecessary that the laying out of the sewer should be before its construction.

A way in a town was laid out and wrought as a private way, and a sewer was constructed through it by the owners of the land. Houses were built on abutting lots, and drains were laid from them connecting with the sewer. The owners of the way and of the sewer obtained permission from the selectmen of the town to enter the sewer into a larger one, which was a part of the general system of sewers in the town, under an arrangement that, if the sewer should not afterwards be laid out by the town, the right of drainage should be on such terms as the selectmen might impose. Afterwards the way was laid out as a public way by the selectmen, and their action was duly adopted by the town. Previously to the laying out it was agreed between the selectmen and the owners of the way and of the sewer that the town should pay the owners the actual expenses which had been incurred in constructing the sewer. The owners then made deeds of release of the land included in the way and of the sewer laid therein, and the town paid them the cost of constructing the sewer, and adopted the sewer as a part of its system of sewers. These agreements and transactions between the owners and the selectmen were in accordance with a long established practice of the town in similar cases. *Held*, that there was such a laying out of the sewer as made it one of the town's sewers, and subjected the land abutting on the street to assessment under Pub. Sts. c. 50, § 7.

The fact that abutters on a private way in a town bought houses and lots with drains running into the sewer which had been constructed in the way by the owners thereof, does not affect the right of the selectmen to lay an assessment, under Pub. Sts. c. 50, § 7, in favor of the town, after the purchase of the sewer by the town from the owners of it, if it does not appear that such abutters had acquired any rights, as against the owners of the fee, which would prevent the sale of the sewer to the town.

KNOWLTON, J. The petitioners have brought their petition for a writ of *certiorari* against the respondents, on the ground that certain sewer assessments levied by the respondents are illegal. They are all owners of land abutting on University Road in Brookline, and the principal question in the case is whether the sewer now existing in that road has been laid out by the selectmen in such a way as to subject abutting landowners to assessment.

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The town has adopted a system of sewerage, under the provisions of Pub. Sts. c. 50, § 7, whereby assessments are made upon owners of estates throughout the town "by a fixed uniform rate based upon the estimated average cost of all the sewers therein, according to the frontage of such estates on any street or way where a sewer is constructed," and in part "according to the area of such estates within a fixed depth from such street or way." A sewer was long ago constructed through University Road, and in that respect the terms of the statute are satisfied. The petitioners contend that the sewer has never been laid out by the selectmen, and that it is not such a sewer as is referred to in § 7.

It has been decided that no particular form of words need be used to constitute the laying out, and that a sewer may lawfully be laid out so as to subject landowners to assessment under § 7 after its construction as well as before. *Bennett* v. *New Bedford*, 110 Mass. 433. *Leominster* v. *Conant*, 139 Mass. 384, 386. Ordinarily, the laying out should be before the construction, to protect the selectmen and their servants from claims of landowners, and for other reasons, but so far as an assessment under this section is concerned it is unnecessary.

In the present case, University Road was laid out and wrought as a private way, and a sewer was constructed through it by the owners of the land. Houses were built on abutting lots, and drains were laid from them connecting with the sewer. The owners of the private way and of the sewer obtained permission from the selectmen to enter the sewer into a larger one, which was a part of the general system of sewers in the town, under an arrangement that, if the sewer should not afterwards be laid out by the town, the right of drainage should be on such terms as the selectmen might impose. Afterwards University Road was laid out as a public way by the selectmen, and their action in laying it out was duly reported, and was adopted and approved by the town at a legal meeting of the voters. Previously to the laying out it was agreed between the selectmen and the owners of the way and of the sewer that the town should pay the owners the actual expenses which had been incurred in constructing the sewer. The owners of the sewer and of the fee of the way then made deeds of release of the land included in University

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Road, and of the sewer laid therein, and the town paid them the cost of constructing the sewer, and took receipts for the payments. The selectmen state in their answer, and it is not contradicted, that it has been the practice in Brookline for many years for landowners to lay out and build streets and to construct sewers at their own cost, and then to offer such streets for acceptance by the town as public ways upon being reimbursed the cost of construction of the sewers, and for the town to accept such of said streets as the selectmen see fit to lay out and report to the town, and for the selectmen to pay for said sewers and to adopt them as part of the system of sewers of the town where it appears that the sewers have been so constructed as to make them fit and proper sewers to be adopted as a part of the system of the town. They also state in their answer that the sewers constructed in University Road were such as, in the opinion of the selectmen, they would have constructed in said way, and were fit and proper sewers to be adopted as a part of the town's system of sewers, and were accepted and adopted and paid for by the selectmen. It is further set forth that the sewer in University Road discharges into other main sewers of the town, and its flow is thence carried through larger sewers a distance of about three miles into the metropolitan sewer. In this hearing all the allegations of the answer must be taken to be true. *Collins* v. *Holyoke*, 146 Mass. 298, 305. We are of opinion that the action of the selectmen in laying out the way under an agreement to pay the owners of the fee the cost of constructing the sewer, and their taking deeds of conveyance from the owners, and their payment of this cost of construction, taken in connection with the long and well known practice of the selectmen of the town in similar cases, and with their previous vote of permission to make a connection of the sewer in University Road with the main sewers of the town, and with the known condition and use of the sewer at the time of laying out the way, and their acceptance and adoption of the sewer as a part of the town's system of sewers, was a laying out of the sewer which made it one of the town's sewers, and subjected the land abutting on the street to assessment under Pub. Sts. c. 50, § 7. It is to be remembered that an assessment under this section is not affected in any way by the cost of the particular sewer on which the

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land abuts, but is made at a uniform rate based upon the estimated average cost of all the sewers in the town. If the town had not adopted a system of sewerage under § 7, it may be that a laying out of a sewer after the completion of the work by private persons would not subject the abutters to assessment under § 4, on the ground that the cost of making had not been directly incurred by the town, and that individuals could not be compelled under the statute to pay a proportional part of the cost of work done by private persons in constructing a particular sewer, or of the price which the selectmen or the town might agree to pay in the purchase of an existing sewer. Whether this be so or not, the reason does not apply to an assessment under § 7.

The fact that abutters bought houses and lots with drains running into the sewer in University Road does not affect the right of the selectmen to lay an assessment in favor of the town after the purchase of the sewer by the town from the owners of it. It does not appear that these abutters had acquired rights, as against the owners of the fee, that would prevent the sale of the sewer to the town.

We are of opinion that the assessment was properly laid.

Petition dismissed.

F. E. Snow & G. D. Burrage, for the petitioners.

C. A. Williams, for the respondents.

LEMON THOMSON *vs.* HENRY POOR & another.

Suffolk. November 23, 1894. — January 8, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Composition Proceedings — Right of Appeal to Superior Court.

In proceedings for a composition in an insolvency case, the debtor, if dissatisfied with the allowance of a claim against his estate, has no right of appeal to the Superior Court.

KNOWLTON, J. The only question now before us is whether, in proceedings for a composition in an insolvency case, the

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debtor, if dissatisfied with the allowance of a claim against his estate, has a right to appeal to the Superior Court.

Nowhere in the statutes is such a right given to the insolvent debtor. By Pub. Sts. c. 157, § 36, an appeal is given to a supposed creditor whose claim is wholly or in part rejected, and to an assignee who is dissatisfied with the allowance of a claim. This section is one of those which are made applicable to proceedings for a composition so far as they can be applied thereto. St. 1885, c. 353, § 1. It is contended that, inasmuch as proceedings for a composition are often had without the issuing of a warrant or the choice of an assignee, a right of appeal from an order allowing a claim should be given to the debtor, although none is expressly mentioned in the statute. We see no evidence that the Legislature intended to confer such a right. It may well have been thought that, if an appeal is proposed to be taken from a decision of the court allowing a claim, an assignee should first be chosen to determine whether it is for the interest of the creditors that the litigation should be taken to the superior court. Although St. 1885, c. 353, § 1, provides that "the proceedings shall not be stayed or suspended on account of an appeal from the allowance or rejection of a claim," the ordinary effect of such an appeal is to create uncertainty and cause delay. In case of such delay, it would often be necessary for the protection of the creditors that an assignee should take in charge the property of the debtor. In the absence of any provision for an appeal by the debtor in this or in any other similar case, we cannot read one into the statute. If important questions of this kind arise affecting the amount which the debtor can afford to pay in composition, or affecting the safety and security of the property during the pendency of the proceedings, it is easy to choose an assignee.

Whether, if there was an error on the part of the insolvency court in the allowance of a claim, the debtor might have it corrected by an application to this court under Pub. Sts. c. 157, § 15, it is unnecessary now to decide.

Appeal dismissed.

M. F. Dickinson, Jr. & S. Williston, for the defendants.

W. A. Knowlton, for the plaintiff.

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JAMES H. WENTWORTH & others *vs.* S. A. WOODS MACHINE COMPANY & another.

Suffolk. December 4, 1894. — January 8, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Equity Practice — Appeal from Decree — Conditional Contract of Sale — Finding — Realty and Personalty — Insolvent Debtor — Preference.

Upon an appeal from a decree of a justice of the Superior Court dismissing a bill in equity, after a hearing upon the merits, the evidence having been reported to this court, and the report containing no statement of rulings made or of facts found, if the evidence warranted a finding of facts on which the decree could properly be made, the decree must be affirmed; and, so far as the decision depends on findings of fact, it will be sustained, unless the findings are clearly erroneous.

If a contract under which personal property is delivered passes no title until a certain condition is performed, the vendor, in the absence of such performance, if guilty of no laches, may reclaim the property, even from one who has purchased from the vendee in good faith and without notice.

A. bought certain machines of a corporation under written instruments, reciting that he had "borrowed and received" of the corporation the machines, the price of which was stated, and containing the following provisions: "If the price set against them is paid as per memorandum in the margin, the property is then to belong to such borrower, otherwise it remains the property of" the corporation. "Notes and drafts, if given, are not to be considered as payments until they are paid, and all part payments are to be forfeited by non-payment of the balance at the time stated. . . . And said borrower agrees to pay such price as per memorandum." They also contained a "memorandum of payments to be made," consisting of one cash payment and the balance in a series of promissory notes. A. gave the corporation the notes called for by the terms of the instruments, some of which were paid at maturity, and others were not, and upon the latter he made small payments in cash at different times and gave renewal notes for the balance, and these latter notes were themselves renewed several times in many instances, the amounts thereof being reduced by partial cash payments; and these payments were applied to the notes falling due without regard to the particular instrument. The corporation wrote to him frequently, urging payment of amounts overdue, but never made any claim under the forfeiture clause in the instruments. A. died, owing a large sum on the notes thus given. *Held*, that these facts warranted a finding that the corporation did not waive the condition of the instruments, and that the condition was not performed.

If a machine delivered under a contract which passes no title until a certain condition is performed is of such a character, and if, with the knowledge and consent of the vendor, it is affixed to real estate in such a manner and under such circumstances, as would make it a part of the realty according to the rules applied between grantor and grantee, and if a third person acquires a title to

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the real estate without notice of the title of the vendor of the machine by reason of non-performance of the condition of sale, the machine will belong to such purchaser of the real estate under his deed.

A. bought certain machines of B. under contracts called leases, containing a condition that the title should not pass until the purchase money was all paid. At the time of the purchase, and for a long time afterwards, A. was only a tenant of the building in which the machines were placed, which was used by him as a planing mill. He got them insured as personal property, and the insurance was made payable to B. as his interest might appear. A. became insolvent before he had paid for the machines, and in the insolvency proceedings B. was included in the list of creditors, and his debt was alleged to be secured by leases. Previously to A.'s insolvency, the real estate on which the mill stood was conveyed to him, he giving to the grantor his promissory note in part payment of the purchase price, and a mortgage on these machines as personal property to secure the payment of the note. The machines rested on the floor, and were fastened merely by screws through holes in the legs for the purpose of steadying them; they were of a regular stock pattern, they could be removed without injury to the building, and they were suitable for use in any other planing mill. *Held*, upon an appeal from the decree of a single justice dismissing a bill in equity, brought by one acquiring title to the real estate to restrain B. from taking the machines under his leases, that a finding that the machines had not become a part of the realty was warranted by the evidence.

A. bought certain machines of B. under contracts called leases, containing a condition that the title should not pass until the purchase money was all paid. He became insolvent, and died before he had paid for the machines. *Held*, that the administrator of A.'s estate should not be ordered to pay B. the sum due him under his leases.

BILL IN EQUITY, filed in the Superior Court on May 18, 1893, by James H. Wentworth and Irving W. Ireland, copartners under the name of James H. Wentworth and Company, and Frank F. Marcy, against the S. A. Woods Machine Company, a corporation, and Albert L. Harwood, administrator *de bonis non* of the estate of Alfred Fitzpatrick, deceased, to restrain the defendant corporation from taking, by writ of replevin or otherwise, certain machines under alleged leases, and to compel the defendant Harwood, as administrator, to pay to the defendant corporation all sums found to be due it under such leases.

At the hearing, it appeared in evidence that Fitzpatrick, the intestate, entered upon and became possessed of certain premises in Newton in January, 1889, with the intention of purchasing the same and erecting a planing mill thereon; that on February 19, 1889, Fitzpatrick, for a valuable consideration, gave his promissory note for $4,000, payable in three months from its date, to the plaintiff Marcy, secured by a mortgage of the machines, fixtures, and implements on the premises; that on March

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19, 1889, Walter C. Lawrence, the owner of the premises, conveyed them to Marcy by warranty deed; that on January 22, 1891, Fitzpatrick gave to Marcy a bill of sale, in the usual form, of the machines, implements, and fixtures included in the mortgage above mentioned, and Marcy took possession of the same and discharged the mortgage; that on January 28, 1891, Fitzpatrick filed his petition in the Court of Insolvency for the county of Middlesex, was duly adjudicated insolvent, and on January 14, 1892, obtained his discharge; that on January 30, 1891, Marcy, by deed of indenture, leased to Fitzpatrick the premises in question, with the machinery, fixtures, etc., for the term of one year, and the lessee occupied under the same; that on May 7, 1892, Marcy, at the purchase price of $10,000 and the assumption of an existing mortgage, delivered to Fitzpatrick a warranty deed conveying to him the premises, and Fitzpatrick thereupon gave his promissory note for the purchase price, and secured the payment of the same by a mortgage of the real estate and also a mortgage of the machines, fixtures, and implements thereon; that Fitzpatrick occupied the premises and carried on the business of a planing mill from his entry thereon in January, 1889, until his death on August 11, 1892; that on September 13, 1892, Isaiah T. Loveland was appointed administrator of the estate of Fitzpatrick, and continued as such until February 10, 1893, when he died; that on March 14, 1893, the defendant Harwood was duly appointed administrator of the goods and estate of Fitzpatrick not already administered; and that in December, 1892, Marcy, under the powers and for the breach of the conditions in the mortgage given by Fitzpatrick to him, and for the purpose of foreclosing the same, took possession of the real estate, fixtures, and machines described therein, and afterwards, on December 23, 1892, by deed of indenture, leased the real estate, machines, fixtures, and implements to the plaintiffs James H. Wentworth and Company.

Elroy N. Heath, the treasurer of the defendant corporation, testified, in substance, that Fitzpatrick had bought many machines of the corporation for use in his business; and that all had been paid for except three, which went into his planing mill, and which were delivered to him under written instruments, dated respectively February 15, April 9, and April 20,

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1889, reciting that he had "borrowed and received" of the corporation the machines, the price of which was stated, and containing the following provisions: "If the price set against them is paid as per memorandum in the margin, the property is then to belong to such borrower, otherwise it remains the property of S. A. Woods Machine Co. Notes and drafts, if given, are not to be considered as payments until they are paid, and all part payments are to be forfeited by non-payment of the balance at the time stated; in the mean time the borrower is to keep the property in good order, and may use it free from any other charge. And said borrower agrees to pay such price as per memorandum, and to keep the property sufficiently insured for the benefit of the said S. A. Woods Machine Co." They also contained a "memorandum of payments to be made," consisting of one cash payment, and the balance in a series of promissory notes.

The witness further testified that the price of two of the machines was $800 each, and of the other $900; that Fitzpatrick gave the corporation the notes called for by the terms of the instruments, some of which were paid at maturity, and others were not, and upon the latter he made small payments in cash at different times and gave renewal notes for the balance, and these latter notes were themselves renewed several times in many instances, the amounts thereof being reduced by partial cash payments; that these payments were applied to the notes falling due, without regard to the particular instrument; that, at the time of his death, there was due on these notes the sum of $518.39, without interest; that this sum had not been paid; and that the corporation never made any claim under the forfeiture clause in the instruments.

Several letters from the corporation to Fitzpatrick, urging payment of amounts overdue, and also letters from the corporation to the administrator of his estate, calling attention to the matter, and asking for payment of the balance due, were put in evidence. There was also evidence that the machines in question weighed from three thousand to forty-five hundred pounds each; that they rested on the floor of the mill, and were fastened merely by screws through holes in the legs for the purpose of steadying them; that they were of a regular stock pattern, they could be removed without injury to the building, and were suit-

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able for use in any other planing mill; that Fitzpatrick had the machines insured as personal property, "with the loss payable to the" corporation "as their interest might appear"; that in the insolvency proceedings of Fitzpatrick the corporation was included in the list of creditors, its security being described as leases; and that the corporation did not prove any claim against the insolvent estate. The defendant Harwood testified that the amount of Fitzpatrick's estate, including outstanding claims, was about $1,600; and that the amount of his indebtedness, outside of the claim of the defendant corporation, exceeded $6,500.

A decree was entered adjudging that the machines were the absolute property of the defendant corporation, and that the plaintiffs were entitled to no relief against the defendant Harwood; and dismissing the bill, with costs. The plaintiffs appealed to this court.

J. C. Ivy, for the plaintiffs.

J. S. Dean, for the defendants.

KNOWLTON, J. This is an appeal from a decree of a justice of the Superior Court sitting in equity. The evidence is reported, and the report contains no statement of rulings made or facts found. If the evidence warranted a finding of facts on which the decree could properly be made, the decree must be affirmed. So far as the decision depends on findings of fact it will be sustained, unless the findings are clearly erroneous. *Francis* v. *Daley*, 150 Mass. 381. *Sheffield* v. *Parker*, 158 Mass. 330. *Debinson* v. *Emmons*, 158 Mass. 592. *Biggerstaff* v. *Marston*, 161 Mass. 101.

The contracts under which the machines were delivered pass no title until the condition is performed, and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from the vendee in good faith, and without notice. *Coggill* v. *Hartford & New Haven Railroad*, 3 Gray, 545. *Hirschorn* v. *Canney*, 98 Mass. 149.

The evidence well warranted the finding that the defendant the Woods Machine Company did not waive the condition, and that the condition was not performed.

If the machines were of such a character, and if with the knowledge and consent of the Woods Machine Company they

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were affixed to the freehold in such a manner and under such circumstances as would make them a part of the real estate according to the rules applied between grantor and grantee, and if the plaintiffs acquired a title to the real estate without notice of the title of the machine company, they would belong to the plaintiffs under their deeds. *Ridgeway Stove Co.* v. *Way*, 141 Mass. 557. *Southbridge Savings Bank* v. *Exeter Machine Works*, 127 Mass. 542. This proposition presents for consideration questions of fact which must have been decided against the plaintiffs at the hearing. The evidence well warranted this decision. Fitzpatrick, when he ordered the machines, and for a long time afterwards, was only a tenant of the building in which they were placed. He got them insured as personal property, and the insurance was made payable to the S. A. Woods Machine Company as its interests might appear. In his insolvency proceedings the Woods Manufacturing Company was included in his list of creditors, and its debt was alleged to be secured by instruments described as leases. When the real estate was conveyed to him he gave the plaintiff Marcy his note for $10,000 in part payment of the price, and he gave a mortgage on these machines as personal property to secure the note. The machines rested on the floor, and were fastened merely by screws through holes in the legs for the purpose of steadying them, they were of a regular stock pattern, they could be removed without injury to the building, and they were suitable for use in any other planing mill. All of these were facts proper to be considered by the judge in determining the question whether the machines had become a part of the real estate. It was a question of mixed law and fact, depending for its answer in part upon the intention of Fitzpatrick as manifested by his acts. We see no reason to question the correctness of the decision of the judge. Certainly his decision cannot be set aside as plainly wrong. *Hubbell* v. *East Cambridge Five Cents Savings Bank*, 132 Mass. 447, 449. *Carpenter* v. *Walker*, 140 Mass. 416. *Southbridge Savings Bank* v. *Mason*, 147 Mass. 500. *Carpenter* v. *Allen*, 150 Mass. 281. *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass. 519.

The plaintiffs contend that the administrator of Fitzpatrick should be ordered by the court to pay the S. A. Woods Machine Company the sums due to it under the leases which it holds on

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the property. The Superior Court rightly held otherwise. It appears that the estate of Fitzpatrick is deeply insolvent, and a use of the assets to redeem this property for the benefit of the plaintiffs, to one of whom Fitzpatrick mortgaged it, would be a preference of the plaintiffs over other creditors of the estate that would be inequitable. *Crompton* v. *Pratt*, 105 Mass. 255. *Knight* v. *Thayer*, 125 Mass. 25. *Decree affirmed.*

GEORGE E. HIBBARD *vs.* COUNTY OF SUFFOLK.

Suffolk. December 14, 1894. — January 8, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Salary of Officer of County Jail — Power of Board of Aldermen of Boston — Approval of Mayor — Statute — Action.

The power of the board of aldermen of the city of Boston as county commissioners to fix the salaries of the officers of the jail of the county of Suffolk is not taken away by St. 1885, c. 266.

It seems, that a regulation of the board of aldermen of the city of Boston as county commissioners, fixing the salaries of the officers of the jail of the county of Suffolk, need not be presented to the mayor for his approval, under St. 1885, c. 266, § 10.

Whether an action for salary due an officer of the jail of the county of Suffolk should not be brought against the city of Boston, instead of the county, *quære.*

CONTRACT, to recover $113.54, for salary as steward of the jail of Suffolk County. The case was submitted to the Superior Court, and, after judgment for the plaintiff for the amount claimed, to this court, on appeal, upon agreed facts, in substance as follows.

The plaintiff is the steward of the jail of Suffolk County, holding that office and performing its duties before and ever since July, 1894, his salary prior to July 30, 1894, being $1,250 a year, the sum fixed by the revised regulations of the board of aldermen of Boston. On July 2, 1894, upon the petition of the sheriff of Suffolk County, presented December 18, 1893, the board of aldermen duly passed a regulation amending that above mentioned, intending thereby to increase the plaintiff's

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salary to $1,350 per year. The regulation was laid before the mayor of Boston, who returned it to the board of aldermen without his approval, and with a statement of his objections, on July 9, 1894. On July 30, 1894, the board again duly passed, by the necessary two-thirds vote, the regulation vetoed by the mayor, and this regulation, if legal and valid, took effect not later than August 24, 1894. On September 20, 1894, as provided by an ordinance of the city, the sheriff of the county of Suffolk, who is the keeper of the jail, presented to the auditor of the city, who is also *ex officio* the auditor of the county, the pay roll of the officers of the jail for the preceding month, with a request for approval thereof, by which pay roll the plaintiff was certified as entitled to the sum of $113.54. The pay roll and requisition were in proper form, and the plaintiff was entitled to be allowed and paid $113.54 by the county at that time, if his salary had been legally increased to $1,350 per annum by the order and proceedings of the board of aldermen above referred to. The auditor refused to approve the pay roll or requisition. The city treasurer, who is also *ex officio* county treasurer, cannot pay any such claim against the county until it has been audited and allowed by the auditor, and, in consequence of this refusal of the auditor, the plaintiff has been unable to collect any portion of the salary due him for the month preceding September 20, 1894, and has been paid nothing therefor.

If, on these facts, the board of aldermen had the power to increase the plaintiff's salary by the regulation of July 30, 1894, and if it was legally fixed at $1,350 per annum by this regulation, judgment was to be entered for the plaintiff for $113.54; otherwise, for $106.14.

T. M. Babson, for the defendant.

A. E. Pillsbury, for the plaintiff.

FIELD, C. J. The only question argued in this case is whether, since the passage of St. 1885, c. 266, the board of aldermen of the city of Boston has the power to fix the salaries of the officers and assistants appointed by the sheriff and employed in the jail of Suffolk County.

It is conceded that up to the time St. 1885, c. 266, took effect, the board of aldermen had this power, and the contention of the defendant is that it was taken from the board by this statute.

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See Pub. Sts. c. 22, §§ 1, 3, 6, 7, 20, 30, 31; c. 23, § 15; c. 220, §§ 26, 27, 72–75; St. 1854, c. 448, § 33; St. 1882, c. 164. The contention is that this power was vested in the mayor of the city of Boston by St. 1885, c. 266, § 6. The executive powers of the board of aldermen, as county commissioners or otherwise, are by this section vested in the mayor, "to be exercised through the several officers and boards of the city in their respective departments, under his general supervision and control. Such officers and boards shall, in their respective departments, make all necessary contracts for the employment of labor, the supply of materials, and the construction, alteration, and repair of all public works and buildings, and have the entire care, custody, and management of all public works, institutions, buildings, and other property, and the direction and control of all the executive and administrative business of said city." These officers and boards of the city are, with certain exceptions, to be appointed by the mayor, subject to confirmation by the board of aldermen, and the officers and boards appoint their "respective subordinates." St. 1885, c. 266, §§ 1–5. The sheriff of the county of Suffolk is not appointed by the mayor. Pub. Sts. c. 10, § 5. Art. XIX. of the Amendments to the Constitution. He is not an officer of the city of Boston, and is not subject to the supervision and control of the mayor. He has the "custody, rule, and charge of the jails," and, as keeper, appoints "all subordinate assistants, employees, and officers, for whom he shall be responsible." Pub. Sts. c. 220, § 23.

The establishing of fixed salaries for officers is not usually regarded as an executive power. The salaries of public officers are often fixed by the Legislature directly, but sometimes the power to fix them is delegated by the Legislature to the board or officer who appoints them, or to some other board or officer. It is in the nature of a legislative power. *Attorney General* v. *Boston*, 142 Mass. 200. *Rockwell* v. *Fillmore County*, 47 Minn. 219. *Ryan* v. *Outagamie Co.* 80 Wis. 336. *Clark* v. *State*, 142 N. Y. 101. The principal executive duties of county commissioners are "to provide for erecting and repairing courthouses, jails, and other necessary public buildings within and for the use of their county," and in the county of Suffolk the expenditures for these purposes are to be borne by the city of

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Boston. Pub. Sts. c. 22, §§ 5, 6, 20. The words of St. 1885, c. 266, § 6, can be given effect if applied to these and similar duties. The prohibitions of § 12 of this statute are intended to relate substantially to the same class of powers as are vested in the mayor by § 6, and each section throws light on the other. The enumeration of powers is in many respects the same in both sections, and must be regarded as characterizing the kind of powers which are called executive, and which are vested in the mayor. The appointment by the sheriff of an officer of the jail is not the employment of labor, or the making of a contract, or the expenditure of public money by the city council or either branch thereof, or by the board of aldermen acting in any capacity. The sheriff is a public officer elected by the people of the county; he is given by the Legislature the custody, rule, and charge of the jail; and as keeper he appoints his subordinates employed in the jail, and is responsible for them. The county commissioners are the board to which is delegated the authority to fix the salaries of such subordinates, and the sheriff, or keeper, if he deems the salaries so fixed inadequate, may present his petition to the Superior Court and have them revised. In Suffolk County the property used for county purposes belongs to the city of Boston, and the city pays the charges; the board of aldermen of the city are the county commissioners; as such this board has not all the powers of the county commissioners of other counties, but it has some of them, and the distinction between the county of Suffolk and the city of Boston is maintained throughout the statutes. The mayor of the city had originally nothing to do with the powers of the board of aldermen as county commissioners. By St. 1885, c. 266, only the executive powers of the board of aldermen, when acting as county commissioners, are taken from the board and vested in the mayor; the other powers of the board as county commissioners do not seem to be affected thereby. There is nothing in this statute which seems designed to affect the appointment of officers of the jail or the fixing of their salaries. The power of fixing the salaries of these officers is distinct from any of the powers enumerated in either § 6 or § 12, and we think it is not a part of the executive or administrative business of the city as these words are used in these sections. We are of opinion

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that this power cannot be considered as one of the executive powers of the board of aldermen as county commissioners, and that it has not been taken from the board by St. 1885, c. 266.

It is not absolutely necessary in this case to determine whether a resolution of the board of aldermen fixing the salaries of the officers of the jail should be presented to the mayor for his approval, under § 10 of this statute; still, the construction to be given to this section may have some bearing upon the construction to be given § 6. Section 10 relates to "all orders, resolutions, or votes of the board of aldermen of said city which involve the exercise of any of the powers conferred by law upon the mayor and aldermen, or the board of aldermen as a separate board." The power to fix the salaries of the officers of the jail is not a power conferred by law upon the mayor and aldermen of the city, or upon the board of aldermen as a separate board of the city council; it is a power conferred on the board of aldermen as county commissioners. The language of this section seems to have been carefully selected, and to have been purposely made different from that used in § 6 or § 12. In § 6 the language is, "All the executive powers now vested in the board of aldermen as such, as surveyors of highways, county commissioners, or otherwise," etc. In § 12, the language is, "Neither the city council nor either branch thereof, nor any member or committee thereof or of either branch thereof, nor the board of aldermen acting in any capacity in which said board may act separately under special powers conferred upon it, nor any member or committee of said board acting in any such capacity," etc. All these provisions show that the Legislature had in mind all the general and all the special powers of the board of aldermen acting in any capacity under the existing laws, and that it chose to provide that the executive powers of this board as county commissioners should be vested in the mayor, leaving untouched what may be called the judicial and legislative powers of the board as county commissioners. As the mayor had nothing to do with the exercise of these last named powers before St. 1885, c. 266, and as these powers were not vested in him by that statute, there seems to be no reason why the action of the board of aldermen as county commissioners in fixing the salaries of the officers of the jail should be presented to him for approval. The language of

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§ 10 is satisfied by confining it to the action of the board of aldermen as a separate board or branch of the city council.

This action is against the county of Suffolk, but by the statutes the debt is the debt of the city of Boston. The obligation of the city to pay the salary of the plaintiff arises wholly from the statutes; there is no actual contract made with him by either the county or the city. It may well be doubted whether the action should not have been brought against the city. The intimation in *Wheelock* v. *Auditor of Suffolk County*, 130 Mass. 486, is that such a suit as this should be brought against the city. This point, however, has not been taken by the county, and as the suit seems to have been brought to determine the powers of the board of aldermen, and to be otherwise a friendly suit, we do not determine it. *Judgment affirmed.*

CHARLES E. WHITTEN *vs.* JOHN HARTIN.

Essex. December 14, 1894. — January 8, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence — Due Care — Evidence.

In an action for personal injuries occasioned to the plaintiff by being shot by the defendant while they were on their way in the Maine woods to a hunting camp on a road bordered by woods and brush, it appeared that there was no reason to expect that any persons were in the vicinity except the party of which they were members, and that the members of the party rode or walked as they chose, those walking not always keeping together, and at a time when both the plaintiff and the defendant were on foot the plaintiff sat down alone in the woods a few feet from the nearest wheel rut and was shot by the defendant, who had discharged his rifle at a partridge, not knowing that the weapon was pointed toward the plaintiff. The defendant excepted because the plaintiff was permitted to introduce evidence that members of the party rested along the route, both in the road and off the road in the bushes, without direct evidence in every instance that it was done with the knowledge of the defendant. The evidence was conflicting as to whether there were bushes about the place where the plaintiff was sitting when the defendant fired, and the plaintiff testified that when he first saw the defendant approaching he did not appear to be about to shoot, and that on the instant after, upon seeing him raise the weapon, he cried out to him, "Don't shoot." *Held*, that the conduct of the members of the party

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with reference to keeping in or going out of the roadway might reasonably be expected to be the same at the time of the shooting as it had been during the journey, and that the jury might reasonably infer that, if members of the party rested outside of the roadway, that fact must have been observed by and become known to the defendant in the course of the journey, and that the evidence as to members so resting was relevant. *Held, also,* that the court could not rule, as matter of law, that the plaintiff was negligent, and that requests based upon the theory that, as matter of law, the plaintiff was not in the exercise of due care, were rightly refused.

TORT, for personal injuries occasioned to the plaintiff by being shot by the defendant. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

O. A. Galvin & J. F. Sweeney, for the defendant.

W. H. Niles & G. J. Carr, for the plaintiff.

BARKER, J. The plaintiff and the defendant were on their way in the Maine woods to a hunting camp. The road built for the convenience of lumbermen and hunters was bordered by woods and brush, and there was no reason to expect that any persons were in the vicinity except the party of which the plaintiff and the defendant were members, and which consisted in all of ten persons, two of whom were guides and two teamsters. Two wagons were with them, one for carrying persons chiefly and the other for supplies. The way was long and rough, and the members of the party rode or walked as they chose. There was game in the woods and most of the party when walking carried guns or rifles, and shot at game or at targets. Those who were walking did not always keep together, and at a time when both the plaintiff and the defendant were on foot the plaintiff found himself alone, and sat down in the woods four or five feet away from the nearest wheel rut. While so sitting he was shot by the defendant with a rifle which the latter discharged at a partridge. The defendant was in the road, having fallen behind the plaintiff, and he discharged the rifle at the partridge not knowing that the weapon was pointed toward the plaintiff. There was some conflict of testimony as to the manner in which the party had proceeded along the road, and the plaintiff's witnesses testified that different members of the party rested along the route, both in the road and off the road in

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the bushes, and the defendant's first exception is because the plaintiff was permitted to introduce evidence tending to show that members of the party so rested, without direct evidence in every instance that it was done with the knowledge of the defendant. The exception is only to the admission of the evidence, and there is no contention that, if it was admissible for any purpose, its effect was not properly limited. The journey up to the time of the shooting had consumed several hours. The conduct of the members of the party with reference to keeping in or going out of the roadway might reasonably be expected to be the same at the time of the shooting as it had been during the journey, and the jury might reasonably infer that, if members of the party rested outside of the roadway, that fact must have been observed by and become known to the defendant in the course of the journey. If he knew it, or would have known it by the exercise of ordinary and reasonable attention to matters which would govern ordinary men in deciding whether it was safe to fire a rifle at the time and place when he fired at the partridge, it was a matter to be considered in determining whether he was guilty of negligence. For this purpose the evidence was relevant, and his exception to its admission must be overruled.

The principal contention upon the defendant's brief is that the plaintiff was himself negligent in leaving the road and sitting down to rest by the roadside where he might be shot, and also in not instantly giving warning to the defendant of his presence when he saw the defendant coming upon the road with a rifle, and the defendant contends that a verdict in his favor upon these grounds should have been ordered, and that instructions which he requested based upon the theory of the plaintiff's want of due care should have been given. But the evidence was conflicting as to whether there were bushes about the place where the plaintiff was sitting when the defendant fired, and the plaintiff testified that when he first saw the defendant approaching he was carrying his rifle and did not appear to be about to shoot, and that on the instant after, upon seeing him raise the weapon, he cried out to him, "Don't shoot." It is very plain that the court could not rule, as matter of law, that the plaintiff was in any respect negligent.

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and that all the requests based upon the theory that, as matter of law, he was not in the exercise of due care, were rightly refused.

No contention is made that there was not evidence to be submitted to the jury upon the issue of the defendant's negligence, and no claim is made that the instructions on which the case went to the jury were incorrect. *Exceptions overruled.*

COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS, WRIGHT DRUG COMPANY, claimant.

Bristol. November 13, 1894. — January 15, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Intoxicating Liquors — Forfeiture — Claimant.

Intoxicating liquors are subject to forfeiture if the servant of the owner, who has immediate charge and control of them, intends to sell them contrary to law. The law deals with the *res* as itself liable to offend.

COMPLAINT, for a warrant to search for intoxicating liquors, alleged to be kept in a building in New Bedford occupied by Edward E. Wright as a drug store, and intended for sale by him in this Commonwealth contrary to law. The Wright Drug Company appeared, and claimed the liquors seized as its own.

Trial in the Superior Court, before *Aldrich*, J., who, having directed the jury to find that the liquors were illegally kept by Wright as set forth in the complaint, rendered judgment that the liquors and vessels containing them be forfeited to the Commonwealth, and, at the request of the claimant, reported the case for the determination of this court. If the ruling and judgment were right, the judgment was to be carried into execution; otherwise, the finding of the jury and the judgment were to be set aside, and an order passed that the liquors and vessels be returned to the claimant.

W. Clifford & W. M. Butler, for the claimant.

L. E. White, District Attorney, for the Commonwealth.

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HOLMES, J. The liquors in question were owned by the claimant, the Wright Drug Company, a corporation. They were kept in a store which belonged to the corporation, and which, as we understand the report, was occupied by it for its business. They were intended by the directors to be sold lawfully by Wright, the treasurer of the corporation and salaried manager of the store under a license of the sixth class held by him. Wright was selling and intending to sell them unlawfully, but this was without the knowledge or consent of the directors. The question is whether the facts recited prevent a forfeiture of the liquors under a complaint charging that they were kept and intended for sale by Wright contrary to law.

The claimant's argument is that Wright was not a bailee, but only a servant, that the company retained the possession of the liquors, and that therefore, as its intent was lawful, the liquors were kept for lawful purposes, and the principle of *Commonwealth* v. *Intoxicating Liquors*, 107 Mass. 396, does not apply. We accept the premises of this argument so far as to assume, for the purposes of this decision, that Wright had not possession of the liquors, nor any special property in them, and therefore that the case is not helped by Pub. Sts. c. 214, § 14. But the principle of the case cited is that the liquor is dealt with as being itself a subject, and as liable to offend notwithstanding the innocence of its owner, like a ship in the admiralty. From this point of view the guilt or innocence of the *res* does not depend upon possession, but may depend upon the intent of the person actually in control of it, although without possession. The master of a vessel may make it liable in this way, although he is only a sort of servant of the owners. By Pub. Sts. c. 100, § 32, the warrant shall set out "the person believed to be the owner, possessor, or keeper of such liquor." The words "or keeper," following "owner" and "possessor," imply that one who is neither owner nor possessor may be a keeper within the meaning of the statute, and warrant the inference that, if the intent of such a person is to sell unlawfully, the liquor may be forfeited under § 37, as "kept . . . for the purpose of being sold in violation of law."

It might be urged, although the point was not taken distinctly,

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that even if the liquors were subject to forfeiture on a charge that they were owned or possibly that they were kept by the Wright Drug Company, on the ground that the company were answerable for the intent of its servant in control and intrusted with the sale of the goods, they could not be said to be kept by one who was not in possession of them. We have already answered this contention in part by the reference to § 32. A further answer is found in the analogy of the decisions that a servant may be convicted of keeping and maintaining a nuisance of which he is not in possession, provided the master intrusts him with the management and control of the business for a short time in the master's absence. *Commonwealth* v. *Merriam*, 148 Mass. 425, 427. *Commonwealth* v. *Brady*, 147 Mass. 583, 584. *Commonwealth* v. *Churchill*, 136 Mass. 148, 151. Here again the word "keep" in the statute is construed as referring to authority to deal with the property, rather than to possession. There is no doubt that Wright had such authority, management, and control. *Judgment to stand.*

SIMON J. CONNERY *vs.* JOSEPH A. MANNING.

Hampshire. November 19, 1894. — January 28, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

False Imprisonment — Malicious Prosecution — Written Statement of the Condition of One's Affairs — Question for Jury — Action under Advice of Counsel.

In an action for false imprisonment and for malicious prosecution on a complaint for obtaining goods under false pretences, the pretence relied on being contained in the written statement as to the condition of his affairs, "Own real estate assessed on valuation of $ 5,000," made by the plaintiff to the defendant's firm, on the faith of which they sold the plaintiff goods, the question whether when he made the complaint the defendant believed that the plaintiff meant his written statement to be understood as it naturally would be understood, and as the defendant might be supposed to have understood it when he sold the plaintiff goods on the faith of it, or whether in consequence of what he had been told afterwards he believed that the plaintiff expected his statement to be understood as the plaintiff testified that he understood it, is a question of fact, and, if material under the circumstances of the case, should be submitted to the jury.

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In an action for false imprisonment and for malicious prosecution, the alleged false imprisonment being an arrest upon the criminal complaint constituting the alleged malicious prosecution, it was argued that the defendant was not liable because he acted upon the advice of counsel; but whether a fair statement of the facts was laid before his lawyer by the defendant, and whether he was honestly following advice honestly asked, was in dispute, and it was not plain what the precise element of doubt was. *Held*, that the plaintiff was entitled to go to the jury, notwithstanding the advice.

TORT, for false imprisonment and for malicious prosecution. Trial in the Superior Court, before *Sherman*, J., who, at the defendant's request, directed the jury to render a verdict for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

W. G. Bassett, for the plaintiff.

W. S. B. Hopkins & D. Manning, for the defendant.

HOLMES, J. This is an action for false imprisonment and for malicious prosecution, and the case comes before us on exceptions to a ruling of the judge directing a verdict for the defendant. The alleged false imprisonment was an arrest upon the criminal complaint constituting the alleged malicious prosecution. By all the testimony, the defendant did not authorize it, and it was made upon a lawful warrant duly issued.* *Mullen* v. *Brown*, 138 Mass. 114. *Coupal* v. *Ward*, 106 Mass. 289. The exception to the ruling upon this part of the case is not much pressed.

The criminal complaint was for obtaining goods under false pretences, and the pretence relied on was contained in a written statement as to the condition of his affairs made by the present plaintiff, Connery, to the defendant Manning's firm, on the faith of which they sold the plaintiff goods. It was as follows: "Own real estate assessed on valuation of ? 5,000." In fact, Connery's real estate was assessed at $2,150. If this were the whole case, no doubt the ruling would have been right. But it is not the whole case. It appeared that the land was mortgaged, as Connery stated in his answers, to a savings bank for $2,900; that the savings bank had its own appraisers; that they had appraised

* Both the defendant and his attorney testified that they asked to have the plaintiff summoned before the court, and that they did not direct that a warrant should issue for his arrest.

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the land at $4,000; and that since that time, at least according to Connery's testimony, he had added improvements of from $1,000 to $1,200. Connery also testified that he thought the bank assessment was the assessment as well as the town assessment, and that he did not understand the question to call for a transcript from the town assessors' book. His attorney testified that Connery made similar statements to Manning, and told him that he thought the question meant to ask the present value of the property. Whether this story was probable or improbable, Dr. Seelye, the president of the savings bank, seems to have taken a somewhat similar view of Connery's state of mind, and to have communicated it to the defendant Manning before the criminal proceedings were begun. He testifies that Manning came to him to make inquiries, and that he told Manning that Connery was a worthy man; that he was not a business man at all, did not know how to do business, and did not know about the assessment valuation at all; that that was a great mystery to him; that he must have assessed the valuation of his property as he supposed the bank valuation was assessed; that he did not know that the property or real estate in the town was assessed by assessors appointed for that purpose; and that Connery was an innocent man.

It may be that the defendant had reason to believe the plaintiff less innocent than the president of the savings bank thought. But the foregoing testimony, coupled with the defendant's admission that probably he would not have instituted the prosecution if he had got his money, and his attorney's testimony that after the interview with Dr. Seelye he said there might be a mistake as to the assessed valuation, presents the question whether, when he made the complaint, the defendant believed that the plaintiff meant his written statement to be understood as it naturally would be understood, and as we may suppose the defendant to have understood it when he sold the plaintiff goods on the faith of it, or whether, in consequence of what he had been told afterwards, he believed that the plaintiff expected his statement to be understood as the plaintiff testified that he understood it. This is a pure question of fact, and, if material under the circumstances of the case, should have been submitted to the jury. *Bacon* v. *Towne*, 4 Cush. 217, 239. *Allen* v. *Codman*, 139 Mass.

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136, 138. *Sartwell* v. *Parker*, 141 Mass. 405, 406. *Donnelly* v. *Daggett*, 145 Mass. 314, 318. *Broad* v. *Ham*, 5 Bing. N. C. 722, 725. *Panton* v. *Williams*, 2 Q. B. 169, 194.

It might be suggested that the question was immaterial because Manning could have nothing more than an opinion about Connery's intent and understanding, and his opinion did not make it improper for him to take the judgment of the only tribunal that could settle the question, inasmuch as on the facts known to Manning there was a case for a jury against Connery, and there is no ground for denying that he believed and had good reason to believe that Connery might be convicted. See *Allen* v. *Codman*, 139 Mass. 136, 138. But the answer to this suggestion is, that, if the jury in the present case should find that Connery was honest and that Manning thought he was, it would not be a defence that Manning reasonably thought that there was a good chance for a conviction against the truth.

It is argued that the defendant is not liable because he acted upon the advice of counsel. But whether a fair statement of the facts was laid before his lawyer by Manning, and whether he was honestly following advice honestly asked, seems to have been disputed, and although it is not very plain what the precise element of doubt is, we cannot say that the plaintiff was not entitled to go to the jury, notwithstanding the advice. *Monaghan* v. *Cox*, 155 Mass. 487, 489, 490. *Donnelly* v. *Daggett*, 145 Mass. 314.

Exceptions sustained.

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ANNIE E. GIROUX *vs.* ALFRED B. WHEELER.

Suffolk. December 11, 1894. — January 28, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Replevin — Order for a Return — Exceptions.

In an action of replevin no exception lies to the order of the court for a return of the chattel to the defendant if the bill of exceptions fails to show that the court had no power to order the return.

REPLEVIN of a horse. At the trial in the Superior Court, without a jury, before *Sheldon*, J., there was conflicting evidence on the issues involved. It appeared that after the replevin of the horse by the plaintiff from the defendant, and while it was yet in the custody of the constable who served the replevin writ, the defendant said to the plaintiff, "I like that horse; what will you take for him?" The plaintiff asked the constable, "Can I sell the horse?" The constable answered, "Yes, it is your horse; of course you can sell him." "Well," said the plaintiff, "I would just as soon sell him to you" (the defendant) "as anybody else; I will sell him for ninety dollars." "Very well," said the defendant, "I will give you ninety dollars, provided you take twenty dollars of it in coal, and the balance, fifty dollars, in cash on November 7, and ten dollars per month until paid for." The plaintiff replied, "I will sell him to you on a lease or conditional sale; I shall not part with the horse until I get my money in full." "Very well," said the defendant, "I will give you a lease; I will give you fifty dollars down and twenty dollars' worth of coal, and ten dollars per month until it amounts to ninety dollars in all." And the defendant signed the lease, dated November 7, 1892, which recited that the defendant had hired and received of the plaintiff one bay horse, for the use of which he agreed to pay the plaintiff fifty dollars on November 7, and twenty dollars' worth of coal to be delivered at the plaintiff's house, and then ten dollars per month until the sum so paid amounted to ninety dollars, when the rent should cease and the horse was to become the property of the defendant; and until then the horse was to remain the property of the

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plaintiff, who had a right to enter any premises and take the horse if the conditions of the agreement were not fulfilled, or if the horse was not properly kept.

It was admitted that the horse was not paid for in full on the day of the trial, and that there was still a balance due to the plaintiff of ten dollars.

The judge found for the defendant, and no exceptions were taken to the finding. The defendant afterwards moved for an order for a return. The plaintiff contended that, on the above facts and evidence, the judge had not the power to order a return. The judge ruled that he had such power, and ordered a return; and the plaintiff alleged exceptions.

P. B. Kiernan, for the plaintiff.

E. A. Upton, for the defendant.

BARKER, J. The question for decision is whether, after the finding for the defendant in replevin, the Superior Court had power to order a return of the chattel. Upon the pleadings, the finding settled it as a fact in the case, that, when the horse was taken from the defendant by means of the replevin writ, he was the owner of the horse, and also that the plaintiff had then no right to its possession. If we assume in favor of the plaintiff that an order for a return will not be granted to a defendant in replevin who is at the time in the possession of the chattel, (*Ware River Railroad* v. *Vibbard*, 114 Mass. 458, 463,) the bill of exceptions does not show that the horse was in the defendant's possession when he moved for the order for a return. Nor can we apply the doctrine that a return will not be ordered when it appears that, if the chattel should be delivered by the plaintiff to the defendant upon the order for a return, the plaintiff could at once retake it under a right acquired or ripened since the commencement of the suit. *Simpson* v. *M'Farland*, 18 Pick. 427. *Whitwell* v. *Wells*, 24 Pick. 25, 33. *Martin* v. *Bayley*, 1 Allen, 381, 382. *Davis* v. *Harding*, 3 Allen, 302, 303. *Leonard* v. *Whitney*, 109 Mass. 265, 268. The plaintiff might have pleaded the arrangement made between himself and the defendant after the service of the replevin writ in bar of the assertion by the defendant of his title. *Campion* v. *Baker*, Lutw. (Nelson's ed.) 356. He did not so plead it, and we cannot say from the statements of the bill of exceptions that the judge who

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ordered the return could not find from the facts and evidence stated that the plaintiff had no right to the possession of the horse under the conditional sale. He may have found that bargain to have been made under such a mutual misapprehension of the facts as not to be binding. The bill of exceptions does not show that the court had no power to order a return.

Exceptions overruled.

EDWARD A. MARWICK & others *vs.* JOHN P. ROGERS.

Suffolk. January 16, 1894. — February 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Maritime Law — General Average — Cesser Clause in Charter-party.

The obligation to contribute to a general average loss, or to general average expenses, springs from the law itself, and not from any contract between the parties concerned, and rests upon the vessel, the cargo, and the freight in proportion to their respective values, and upon the owners of each in proportion to the value of their property at risk; and it may be enforced by resorting to a lien upon the property saved from the common peril, or by action against the persons bound to contribute.

A charter-party contained the following clause: "It is further agreed that all liability of charterers under the agreement shall cease as soon as the cargo is shipped on board. All questions, whether of demurrage or otherwise, to be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose." *Held*, that, under this clause, the charterer, who was also the owner of the cargo, was not released from his obligation to contribute to the payment of general average expenses. MORTON, J. dissenting.

BARKER, J. This suit is brought by the owners of a barque to recover of the defendant, who was the charterer of the vessel and also owner of her cargo, his share of general average expenses. The declaration alleges, in substance, that the plaintiffs are owners of the vessel, that they made a contract of charter-party with the defendant to carry a general cargo of merchandise from Boston to Talcahuano; that in pursuance thereof the vessel was duly laden with a cargo owned by the defendant and sailed from port; that upon her voyage she sustained, from bad weather, heavy gales and a heavy sea, damages by which it be-

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came necessary to put into a port of distress, where there were general average expenses amounting to the sum of $1,695.95, of which the cargo should bear its proportional part; that a certain proportion of this sum, but not the full amount, was thereafter paid by the owner of the cargo, which amount so paid the plaintiffs refused to receive in full settlement of the cargo's proportion of general average; that upon the arrival home of the vessel general average adjustments were duly made, in which the contribution of the cargo to the general average expenses amounted to the sum named, which sum was duly demanded of the defendant, who refused payment; and that at the time of the accident, and while the expenses were thus incurred, the defendant was the owner of the cargo. The charter-party was not set out in the declaration, but at the request of the defendant a copy of it was subsequently filed, and it thus appeared that it contained the following stipulation or cesser clause: "It is further agreed that all liability of charterers under the agreement shall cease as soon as the cargo is shipped on board. All questions, whether of demurrage or otherwise, to be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose." Thereafter the defendant demurred, on the ground that it appeared in the charter-party that all his liability thereunder ceased as soon as the cargo was on board, and that all questions must be settled with the consignees, the owners and captain looking to their lien on cargo for this purpose, and that it appeared from the declaration that the alleged cause of action arose after the cargo had been shipped. This demurrer was sustained, and judgment ordered for the defendant, and the plaintiffs appealed to this court.

Upon the hearing of the appeal, the defendant, besides contending that he was freed by the clause quoted from any obligation to contribute personally to general average expenses, as the owner of the cargo or otherwise, also contended that it was implied by the declaration that there was an adjustment of the general average expenses at the port of distress, by which adjustment the plaintiffs were bound. But there is no allegation of such an adjustment, and the questions which might be raised if it had been pleaded are not open upon this demurrer. Nor is the question whether the clause quoted exonerates the defendant

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from his obligation as owner of the cargo to contribute to general average expenses raised in due course of pleading. The declaration, while alleging that the plaintiffs made a contract of charter-party with the defendant, in pursuance of which the vessel was duly laden and sailed upon the voyage agreed upon, is not on the charter-party, but is on an obligation imposed by law upon the defendant as owner of the cargo. The proper course for the defendant was not to crave oyer of the contract; but, if he relied upon its provisions in defence, to plead the charter-party in his answer. If a correct course of pleading had been followed, the question of the effect of the stipulation upon the plaintiff's claim to contribution from the defendant as owner of the cargo would not have arisen until a later stage of the cause. But as the plaintiffs are content to accept and to argue the issue upon the pleadings as they stand, and as the decision of the question must be the same whether it is now dealt with or at a later stage of the cause, we have thought best now to dispose of it.

The obligation to contribute to a general average loss, or to general average expenses, springs from the law itself, and not from any contract between the parties concerned. See *Gage* v. *Libby*, 14 Allen, 261, 267, in which, after defining the obligation, Mr. Justice Gray says that those who are liable must contribute "in equity and justice, and by the express rule of the Rhodian law, preserved in the Pandects, from which the maritime law of all civilized nations on this subject is derived." See also *Burton* v. *English*, 12 Q. B. D. 218, 220, where Lord Brett says of the obligation, "I do not think that it forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so, the liability to contribute does not arise out of any contract at all." See also *Sturgis* v. *Cary*, 2 Curtis, C. C. 382, 384; *Anderson* v. *Ocean Steamship Co.* 10 App. Cas. 107, 114; Abbott, Shipping, (13th ed.) 626.

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The obligation rests upon the vessel, the cargo, and the freight, in proportion to their respective values, and upon the owners of each in proportion to the value of their property at risk; and it may be enforced by resorting to a lien upon the property saved from the common peril, or by action against the persons bound to contribute. See Abbott, Shipping, (13th ed.) 657; *Anderson* v. *Ocean Steamship Co.* 10 App. Cas. 107, 115.

The declaration taken by itself, therefore, states a good cause of action, springing from the duty cast upon the defendant by the law to contribute in payment of general average expenses in proportion to the value of his cargo; and the question for decision is, whether the stipulation of the charter-party frees him from this obligation. In the opinion of a majority of the court it does not.

It is to be observed that no explicit agreement of this charter-party placed the defendant or his property in such a relation to the vessel or to the adventure that he was thereby rendered liable to general average contributions. Under no circumstances could the plaintiffs recover of him such a contribution by an action upon the charter-party as a written agreement the terms of which bound him to make such a contribution. He agreed to furnish the vessel a full cargo of lawful merchandise, to pay a stipulated sum for the charter or freight of the vessel during the voyage on the proper delivery of the cargo at the port of destination, and to pay demurrage at a stipulated rate in case the vessel should be detained longer than the agreed lay days, either in loading or discharging. But he made no advance payment of freight, and so did not become its owner in part or in whole, and he was not required to be the owner of any part of the cargo. There was nothing in his agreements which constituted him an owner either of cargo or of freight, or which required him to become such an owner, or which placed him in such a position as to make him liable to general average charges. As charterer he was not so liable. The duty rests only upon the owners of vessel, cargo, and freight; and he could perform all his agreements without incurring that obligation. His agreements to pay the freight, and to pay for the detention of the vessel at the port of discharge, could only be performed after the cargo was on board. These agree-

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ments were matters arising under the charter-party itself, which afforded a field for the operation of the clause the meaning of which is now in question, and its operation is naturally limited to that field. What the parties agree is, that all the defendant's liability under the charter-party shall cease as soon as the cargo is shipped on board; and the final sentence, "All questions, whether of demurrage or otherwise, to be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose," is to be read in the light of this agreement. It does not extend the waiver of his liability, and is to be construed as dealing only with questions arising under the charter-party. To give to the stipulation the meaning for which the defendant contends, and to construe it as releasing him from obligations which are not imposed by the charter-party but by the law itself, and which are incidental not to his position as charterer but to his ownership of the cargo, a relation as to which the charter-party is silent, permitting him to furnish a cargo of which he may not be the owner, would be to strain the language of the contract, and to do violence to what we think from the whole instrument was the intention of the parties; — namely, to free the charterer, upon his furnishing a full cargo, from possible liabilities cast upon him by the terms of the charter-party, which by its terms he might otherwise personally be called upon to discharge after the full cargo had been shipped on board. By force of its provisions, although he had agreed in terms to make certain future payments if they should be earned by the vessel, he was exonerated from any personal obligation to make them when he had put a full cargo on board, and the owners of the vessel agreed in that case thereafter to look for those payments only to the cargo and to its consignees.

Such stipulations, or cesser clauses, are not unusual in charter-parties, and questions of the obligation to pay freight, or demurrage, or damages for detention, when the charter-party contains such a clause, have frequently been before the courts, especially in England. See Abbott, Shipping, (13th ed.) 226–238, and cases there cited. So far as we are aware, the effect of such a stipulation upon the liability of a charterer to contribute as owner of cargo to a general average loss has not been considered by the English courts. But the case of *Gullischen* v. *Stewart*, 11 Q. B. D. 186,

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and 13 Q. B. D. 317, holds that a cesser clause does not exonerate a charterer who is also consignee from a liability imposed upon him not as charterer but as consignee; and the charterer was there held liable as consignee, in respect of delay at the port of discharge, although it was stipulated by a cesser clause in the charter-party that the charterer's liability should cease as soon as the cargo was on board. Since the argument our attention has been called to the case of *The Eliza Lines*, 61 Fed. Rep. 308, 325, in which the Circuit Court of the United States for the First Circuit very recently has held that, if the charterer is also owner of the cargo under bills of lading, a cesser clause does not exonerate him from contributing to a general average loss.

It is possible that a charterer, by prepaying the freight without a right to repayment in case of loss, or in other ways, may become in whole or in part its owner. See *Frayes* v. *Worms*, 19 C. B. (N. S.) 159, 174, 175. Whether in such a case the cesser clause should exonerate him from contributing, as owner of freight, to a general average loss, we do not now decide. Such a liability, which, while imposed by the law, might be said to arise in consequence of the position in which the terms of the charter-party place him as owner of freight, may perhaps be more readily considered as within the cesser clause than his liability as owner of the cargo, a relation which he is not bound to take by virtue of any term of his contract. While it is plain that in any voyage general average losses or expenses may be incurred by some parties to the adventure, we are not able to assent to the conclusion that the liability to which they give rise is one which can fairly be impliedly written into every charter-party, or one with which the cesser clause now in question was meant to deal. Unless in cases where by the terms of the charter-party the charterer is put into such a relation to the other persons who are obliged to make or are entitled to receive contribution to a general average loss or to general average expenses that the necessary result of the contract is that he is liable to make such contribution if a general average loss occurs, we cannot assent to the doctrine that he is released by the cesser clause from an obligation which the law imposes, not because he is the charterer of the vessel, but because he is the owner of the cargo.

There are other considerations which tend to strengthen this

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conclusion. The duty which rests upon the parties concerned is one imposed by the law itself, and it is not a matter of course that one upon whom a duty is so cast may contract himself wholly out of the obligation, though he may stipulate for some other rule of adjustment than that of the place of the contract. Certainly an owner of cargo cannot by a contract with the owner of the vessel be relieved from this obligation to other owners of cargo or to other owners of freight. By the necessity of the case, when a general average act is to be done it must be done by the authority of the master, who is selected and paid by the owners of the vessel, and who stands in a closer relation to them than to the owners of the cargo. Yet, in deciding upon the general average act, he is from necessity deemed to be the agent alike of the owners of the vessel, of the cargo, and of the freight; and the fact that the owner of the cargo is exonerated from contributing to make good the loss to be occasioned by the master's act may tend to bias him in his decisions, and so may unreasonably imperil the whole adventure. If the owner of the cargo is exonerated from contributing to general average losses, he must also be held to have no right to claim such contribution from others; a consequence which is not to be implied from an agreement like the present charter-party. Insurance of vessel, freight, and cargo has long been a usual incident of maritime adventures, and in case of an abandonment to the underwriters after a general average loss the insurers are substituted to the right of the assured to contribution for such losses. But the mutual relinquishment of the right of contribution by the owners of the vessel and of the cargo, or its relinquishment by either, may avoid insurance, and prevent recourse to underwriters, a result which we cannot believe was contemplated by either party to the present charter. See *Schmidt* v. *Royal Mail Steamship Co.* 45 L. J. (Q. B.) 646, and *Crooks* v. *Allan*, 5 Q. B. D. 38, 40. In the case last cited it was held that a stipulation inserted by the owners of a vessel in a bill of lading, to the effect that they were not to be liable for any damage which was capable of being covered by insurance, and which stipulation they contended had the effect to exonerate them and their vessel from liability to contribute to general average losses, did not so relieve them, because "the office of the bill of lading is to provide

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for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average, and unless the contrary appears, the words used must be so construed." The present case is so analogous to that decided in *Crooks* v. *Allan* as to make that case an authority for the conclusion to which we have come. A charter-party is no more concerned than is a bill of lading with liabilities growing out of general average, nor is there more reason for construing it as dealing with them, when it does not do so in express terms. In *Clink* v. *Radford*, [1891] 1 Q. B. 625, in holding that the cesser clause did not exempt the charterers from liability for delay at the port of loading, because no lien was given by the charter-party for damages for such delay, it was said by Fry, L. J., that "the clause does not say that all the charterer's liability is to cease, nor simply the charterer's liability, but the charterer's liability under the charter-party." See also *Dunlop* v. *Balfour*, [1892] 1 Q. B. 507; *Hansen* v. *Harrold*, [1894] 1 Q. B. 612. The charter-party upon which the defendant relies was made by filling out a printed blank, as is commonly the case in making such instruments; and in construing it due regard should be given to the incidental effect which our construction may have upon the rights of other persons who make use of such blanks; and we think that in the mercantile world such cesser clauses have not been deemed to have any relation to questions of general average, or to do more than to regulate the liabilities of the charterer under the charter-party.

We are aware that in the earlier decisions upon cesser clauses there are found general expressions to the effect that by their operation the charterer is exonerated from all future liability when the cargo is laden. See Abbott, Shipping, (13th ed.) 226–238, and cases there cited. But the present English doctrine is that even as to breaches of the charter-party itself the clause will be construed as inapplicable, if by construing it otherwise the shipowner would be left unprotected. See *Clink* v. *Radford*, *Dunlop* v. *Balfour*, and *Hansen* v. *Harrold*, *ubi supra*.

And in the English cases generally it should be noticed that the courts were dealing with liabilities of the charterer as charterer, arising under the contract itself, and the general terms used in such decisions are to be qualified by that fact, and do

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not intend to hold that the charterer is exonerated from outside liabilities imposed upon him by the law, when he assumes, and because he assumes, an additional relation to the adventure as owner of the cargo.

In the opinion of a majority of the court the entry must be,

Judgment for defendant set aside, and demurrer overruled.

MORTON, J. I am sensible of the weight to which the conclusion reached by the rest of the court is entitled, and it is with regret that, after much consideration, I find myself unable to concur in it, or to suffer the opinion to go without a dissent.

Charter-party contracts are, in the broadest sense of the words, commercial contracts, and should be construed, if possible, in harmony with mercantile usage and understanding when these are not contrary to law. Where there is manifestly but one construction of the language used, the parties must of course abide by that construction. But where, as here, the question relates to a clause of a peculiar character, the language of which is not free from ambiguity, such a construction should be adopted, if it can be, as will be fair and reasonable, having regard to the mutual interests of the parties, and to the main object of the contract. *Dahl* v. *Nelson*, 6 App. Cas. 38, 59. *Crookewit* v. *Fletcher*, 26 L. J. (Ex.) 153, 159.

The introduction of cesser clauses into charter-party contracts was due to the fact that frequently the charterer was only an agent, whose interest in the cargo ceased after it was shipped on board, or was a merchant who expected to dispose of the cargo while afloat, and both of whom naturally would desire to be relieved from liability to the shipowner for anything happening to the ship during the voyage. Abbott, Shipping, (13th ed.) 226, 227. *Gray* v. *Carr*, L. R. 6 Q. B. 522, 527. There was also the consideration that, if anything happened to the ship, the matter probably could be adjusted better by the consignee than by the charterer, who might be remote from the port of repair or destination. Generally coupled with the waiver of the personal liability of the charterer is an agreement, on the part of the shipowner or captain, to look to his lien on the cargo, or to the consignee, or both.

There is nothing unfair, nor unreasonable, nor at variance

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with any principle of law, in an agreement of such a character when understandingly entered into, and there is no reason why a different rule of construction should be applied to it from that which is ordinarily applied to contracts. The charterer may contract properly enough to be absolved from personal liability for anything happening to the ship after the voyage is begun. The shipowner may agree to rely on his lien on the cargo, and well may be content with that security. If anything occurs by which he loses it, that is one of the risks which he takes.

The effect of cesser clauses has been much more considered in England, where they appear to have been originally introduced, than in this country, and the inclination of the English courts, at the outset, was to construe them strictly. More recently, however, the rule has been laid down, that where the shipowner has a lien co-extensive with the liability, which for aught that appears was the case here, the effect of the cesser clause will be to relieve the charterer. *Clink* v. *Radford*, [1891] 1 Q. B. 625. *Dunlop* v. *Balfour*, [1892] 1 Q. B. 507. *Hansen* v. *Harrold*, [1894] 1 Q. B. 612. This rule has been declared to be "a most rational one." Per Fry, L. J., *Clink* v. *Radford*, *ubi supra*, 632. And in the same case the Master of the Rolls said that, if the shipowner has a remedy for his loss, "we should construe the cesser clause in its fullest possible meaning, and say that the charterer is released." *Ibid.* 627.

No case appears to have come before any court, either in this country or in England, in which the question has been considered, of the effect of a cesser clause in a charter-party upon the liability of the charterer, who was the owner of the cargo, for a general average loss occurring to the ship, and for which the shipowner had a lien on the cargo, which is this case. The cases that have arisen have related mostly to claims for detention, or delay in loading or unloading, or for not furnishing a full cargo; and, although they deal in the main with breaches of express agreements contained in the charter-party, I do not see why the rule finally established by the English courts is not a sound one, nor why it should not be applied in the case before us.

The plaintiffs in substance contend that the application of the cesser clause must be limited to liabilities created by the charter-

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party; and that this case does not come within the operation of the cesser clause, because, as they further contend, the obligation to contribute to a general average loss is not expressed or implied in the charter-party, and does not depend on a contract, but grows out of a law of the sea that those who have received a common benefit from a sacrifice voluntarily made in a common adventure shall share the loss so occasioned. But, whatever the origin of the rule requiring contribution in case of a general average loss, it has been long established as part and parcel of the maritime law, and every contract for the carriage of goods by sea must be assumed to be made with reference to it. In *Anderson* v. *Ocean Steamship Co.* 10 App. Cas. 107, 115, which was an action to recover a contribution to a general average loss which it was alleged the defendants promised that they would contribute and pay, Lord Blackburn said, "The promise . . . would be implied by law in every contract for the carriage of goods." See also *Wright* v. *Marwood*, 7 Q. B. D. 62, 67, per Bramwell, L. J. But this case does turn, it seems to me, on the question whether the liability of the defendants as owners of the cargo to contribute to a general average loss occurring to the ship is implied in the contract, or whether an action for the recovery of the contribution sued for could be maintained on the charter-party. The parties must be held to have contracted with the knowledge and understanding that there was a liability on the part of the charterer, as owner of the cargo, to contribute to general average losses and expenses sustained by the ship, if such should occur during the voyage. The shipowners could absolve the charterers from this liability, although created by law and not by contract, if they saw fit to do so. And the question therefore is, What did the parties intend by the cesser clause which they put into this contract? Did they mean to confine its operation to freight and demurrage, which are the only liabilities on the part of the charterer expressly created by the charter-party to which it could apply, or did they mean to include in it liabilities on the part of the charterer which might arise by reason of anything happening to the ship while it was engaged in transporting the cargo, to which the charter-party related, and for which liabilities the shipowner would also have a lien on the cargo? I think that they meant the latter, and that that is

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the fair and reasonable construction. The main object of the charter-party was to secure the transportation of the cargo which the defendant was to furnish. The freight and demurrage were payable in respect of that, and nothing else. No claim for contribution to a general average loss can exist, unless there is a contract, express or implied, for the carriage of the goods on account of which it is made; and it is well settled that the shipowner has a lien on the cargo for general average losses and expenses occurring to the ship. Is it then reasonable to suppose that, when the parties stipulated by the cesser clause that "all questions, whether of demurrage or otherwise," should "be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose," they meant to include the express liability of the charterers to the shipowners for freight and demurrage for which there was a lien, and did not intend to include the liability, which all parties understood might arise, of the charterers to the shipowners on account of the cargo shipped by them for a general average loss to the ship, and which no one could estimate, and which if it arose would be equally secured by a lien? There is nothing in the nature of a claim for general average which gives it a higher standing than a claim for freight or demurrage. No good reason can be given why, on principle, a liability on the part of the charterer to contribute as owner of the cargo to a general average loss occurring to the ship, which is secured on the part of the shipowner by a lien on the cargo, should be treated any differently from a liability for freight or demurrage, which is also secured by a lien on the cargo. The clause should not be construed strictly and narrowly. The words used are inclusive rather than restrictive. The language is "all liability of charterers under the agreement," and "all questions, whether of demurrage or otherwise." The parties intended, I think, that after the cargo was on board the charterers should be absolved from personal liability in respect of it for anything happening to the ship after the voyage was begun for which the shipowner or captain would have a lien on the cargo, and that if anything did happen the owner and captain were to look to their lien on the cargo and to the consignees, and not to the charterers. This is the result, as I understand them, of the English decisions. A claim upon the charterers,

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as owners of the cargo, for a general average loss to the ship occurring while the cargo was being transported to its destination in accordance with the contract, and to secure the carriage of which was the main object of the contract, fairly may be said to be a liability arising under the agreement, and to come within its scope.

There are cases in which it has been held that the cesser clause did not extend to liabilities under a bill of lading received by the charterer of the cargo to be conveyed under the charter. *The Eliza Lines*, 61 Fed. Rep. 308, 325, 326. *Gullischen* v. *Stewart*, 11 Q. B. D. 186, and 13 Q. B. D. 317. But that was because the bill of lading was regarded as a separate and independent contract, just as a draft or bill of exchange for the freight would be. There is no such question here, and those cases, therefore, do not affect the construction of the clause under consideration. The case of *Crooks* v. *Allan*, 5 Q. B. D. 38, 40, stands on its particular facts; though it assumes that, even under a bill of lading, there may be an exemption from liability to a general average loss, if that is the effect of the contract, and the parties so understand it. Besides, the case, if not a subject of its criticism, is far from having been approved by this court. *Wamsutta Mills* v. *Old Colony Steamboat Co.* 137 Mass. 471.

Some general considerations respecting the right of contribution between owners of a cargo for a general average loss, and respecting the effect upon the insurance of the vessel and cargo of construing the cesser clause so as to include such a loss, are adduced in the opinion of the majority of the court as fortifying the conclusion there reached. They do not seem to me to do so, but rather to obscure the real issue. This case comes before us on the defendant's demurrer to the plaintiffs' declaration, of which the charter-party is to be taken, for the purposes of this case, as forming a part. The declaration alleges that the ship was laden with a cargo that belonged to the defendant, and that at the time when the accident happened to the ship, and the expenses were incurred, the defendant was the owner of the cargo. No other person, so far as appears, was an owner of or interested in the cargo with him. The question is, first, whether a charterer, who is the owner of the cargo, can agree

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with the shipowner that the latter will waive the personal liability of the former in respect of the cargo for a general average loss occurring to the ship, and look to his lien on the cargo; and, secondly, whether that is the effect of the cesser clause in this case. The case does not involve, in any aspect of it, the question of contribution between the owners of a cargo, or between the respective owners of the cargo and of the ship, for a general average loss occurring by reason of a sacrifice of a part of the cargo. But it stands precisely as it would stand if all the owners of a cargo were also the charterers of the ship, and the charter-party contained a clause which it was alleged constituted an agreement on the part of the shipowner to look to his lien on the cargo, and to waive the personal liability of the charterers in respect of the cargo, for a general average loss occurring to the ship. How can the construction of such an agreement be affected by any considerations as to the rights of the parties to contribute under a different state of facts? Undoubtedly a shipowner cannot release an owner of a part of a cargo from the liability to contribute to other owners of the cargo. But the shipowner does not undertake to do that in this case; but only to release his own right of contribution for a general average loss occurring to the ship, and to look to his lien on the cargo for it. Neither do I see how the matter of insurance affords any light. If after insurance is effected the owners of the ship and cargo enter into any agreement which impairs the right of subrogation which the insurer would have in case of loss, it is possible that the policy might be avoided to that extent. But there is nothing to show that there was any insurance here, and presumably insurance is not usually effected till after the charter-party contract is entered into, and the cargo is on board.

I think that the ruling was right, and that the demurrer should be sustained.

E. P. Carver, for the plaintiffs.

R. Stone, for the defendant.

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BOSTON ELECTRIC COMPANY *vs.* CITY OF CAMBRIDGE.

Middlesex. November 14, 1894. — February 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Contract — Authority of Committee of City Council — Ratification by City.

A city council by vote authorized its committee on public property to contract "for the erection" of a school building in accordance with the plans and specifications of an architect, the total cost of the building not to exceed a sum named. *Held*, that the committee, having made a single contract with A. for the erection of the whole building, exhausted its authority under the vote, and, in the absence of any further authority conferred upon it, could not bind the city by a contract with B. to furnish electrical appliances for the building not contained in the specifications referred to in the vote.

An officer of a city, who is not authorized to contract for the city, has no authority to ratify in its behalf.

The acceptance and use of a building by a city does not bind it to pay for extra unauthorized work done upon it, although the same is beneficial.

CONTRACT, to recover $250, the balance alleged to be due the plaintiff under a contract to furnish the electrical appliances for a school building in the defendant city. Trial in the Superior Court, before *Fessenden*, J., who declined to rule, as requested by the defendant, that the plaintiff could not recover; directed the jury to return a verdict for the plaintiff; and, at the request of the parties, reported the case for the determination of this court. If, upon the facts agreed, the jury would have been justified in finding for the plaintiff, judgment was to be entered upon the verdict; otherwise, judgment was to be entered for the defendant. The facts appear in the opinion.

J. C. Sharkey, for the plaintiff.

G. A. A. Pevey, for the defendant.

ALLEN, J. The claim of the plaintiff in this case is so meritorious that we regret that the rules of law do not allow a recovery of the amount claimed.

The facts stated in the report fail to show authority on the part of the committee on public property to contract the debt sued for. This committee is stated to be a joint standing committee of the city council, appointed yearly, but its general powers and duties are not shown, further than its name implies.

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This of itself does not show authority to incur debts in behalf of the city. We have then to see what special authority the committee had. In the first place, it was authorized by vote of the board of aldermen and the common council to advertise for proposals for building an English high school, in accordance with plans and specifications prepared by Chamberlain and Whidden, architects. This probably was done; at least there is no intimation in the report to the contrary. On July 23, 1889, a vote was passed by the common council and the board of aldermen, ordering "that the committee on public property be authorized to contract for the erection of an English high schoolhouse in accordance with plans and specifications therefor made by Chamberlain and Whidden, architects. The total cost of said schoolhouse not to exceed the sum of two hundred thousand dollars." No other vote or order of the city council or board of aldermen giving authority to the committee in respect to said schoolhouse appears by the records to have been passed. No vote or order was shown making it the duty of the committee to superintend the erection of the building, or giving to it the power to make any change in the plans or specifications prepared by the architects. Their authority was to contract for the erection of the schoolhouse in accordance with the plans and specifications, and there, so far as the terms of the vote go, their authority ended. After the passing of said order, and at a date which is not given in the report, the committee "entered into a written contract with one Giddings in relation to the building of said high schoolhouse, one item of said contract being as follows: 'Include in the estimate the sum of $250 for bells, tubes, and electric lighting.'" We may perhaps assume that this contract was for the erection of the schoolhouse, and that it was in accordance with the plans and specifications made by the architects, and that the item for bells, tubes, and electric lights was included in those specifications. Afterwards, at a meeting held on January 26, 1891, as the report states, the committee requested one Austin, a member of a firm of architects employed on said building, to obtain from various parties proposals for furnishing the electrical light work on the schoolhouse. On November 20, 1890, as stated in the report, — there appears to be some confusion of dates, but it is probably immaterial, — Austin asked the plaintiff to furnish such a propo-

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sal, which the plaintiff did, according to specifications furnished by Austin. The cost was to be $384.50. Austin presented this proposal to the committee. At a meeting of the committee held on January 26, 1891, according to its records, "the subject was considered of certain additional requirements in the completion of the new high schoolhouse. . . . Mr. Austin submitted statements in relation to the internal finish of the high school, as follows: Bells and speaking-tubes, $384.50. Credit allowance in specifications, $250. Net, $134.50." Another meeting of the committee was held on March 19, 1891, and there was a discussion among the members as to its authority to accept a bid of over $300, in view of an ordinance of the city providing that no committee authorized to purchase materials or supplies, or to contract for labor to be performed, should have power to expend more than $300 for any one specific purpose, unless specially empowered, etc. Austin's view was that the committee had the authority, and the committee voted to have speaking-tubes at an extra cost of $134.50, and instructed Austin to inform the plaintiff that its bid had been accepted. This was done the next day. The plaintiff thereupon did the work, which, according to the report, "was accepted by the committee, and the building was afterwards accepted by the city." It is not stated in what manner the building was accepted by the city, but, as hereinbefore recited, it is stated that no other vote or order of the city council or board of aldermen appears by the record to have been passed.

Giddings, the original contractor, "did no work whatsoever, and did not offer to do any work, upon the portion of the work contracted for by the plaintiff, or for which the said sum of $250 was set apart in the Giddings contract."

It would thus appear that, at a time which was probably about eighteen months after making the contract with Giddings, the committee on public property assumed to take into consideration certain additional requirements not contained in the specifications of the architects, Chamberlain and Whidden, and not included within the original authority given to the committee. Whether the committee in March, 1891, when it voted to incur this additional expense, and to employ the plaintiff to do this work in the place of Giddings, was composed of the same

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persons who constituted the committee in July, 1889, when the committee was authorized to contract for the erection of the schoolhouse, does not appear in the report. Perhaps it is not material. It may be that under the original vote of authority the committee were not limited to making a single contract for the whole work. It may be that they were at liberty to make separate contracts with the mason, the carpenter, the plasterer, the plumber, etc. See *Damon* v. *Granby*, 2 Pick. 345; *Simonds* v. *Heard*, 23 Pick. 120; *Keyes* v. *Westford*, 17 Pick. 273; *Shea* v. *Milford*, 145 Mass. 528. We do not need to determine this question, because apparently the committee executed its authority by making a single contract with Giddings for the erection of the whole building, according to the plans and specifications of the architects. It is conceded by the plaintiff that Giddings's contract was "for the erection of the building." This having been done, its authority under the vote was exhausted. It was not even directed to superintend the erection of the building. Much less had it the authority to add to the specifications which were expressly referred to in the vote; and we can find in the report nothing to show that any such authority was conferred upon the committee afterwards. It is indeed stated that "there was then a custom which permitted one of two contracting parties to excuse the other from performance of a portion of his contract, and to deduct the value or price of said unperformed portion from the entire contract price, and that the said committee on public property intended to avail themselves of this custom as to the portion of said Giddings's contract referred to" heretofore. If this means that when the city was a contracting party there was a custom which permitted the committee on public property to act in the manner stated, it still falls short of showing that it was a custom for the committee to bind the city by a new contract for a larger sum with a new contractor; so that, however Giddings might be affected, we do not see how the plaintiff can get any benefit from this custom. The difficulty is that the authority of the committee to bind the city by contract in relation to the schoolhouse was fixed and limited by the vote of July 23, 1889. This authority was executed. We cannot assume that each succeeding committee in successive years could add new features, and contract with A, B, C, and D

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to furnish them outside of the specifications referred to in the vote, provided that no one bill exceeded three hundred dollars. The report does not show any other or subsequent authority which was conferred upon the committee in the premises. *Keyes* v. *Westford*, 17 Pick. 273. The plaintiff was bound to ascertain and take notice of the extent and the limitations of the power of the committee to bind the city. *Lowell Five Cents Savings Bank* v. *Winchester*, 8 Allen, 109. Story, Agency, (9th ed.) § 307 *a*. *Davies* v. *New York*, 93 N. Y. 250. *Turney* v. *Bridgeport*, 55 Conn. 412.

There was no sufficient evidence of ratification by the city of the contract with the plaintiff. It is stated that, "when the plaintiff had partly completed the work contracted for, the defendant paid to the plaintiff the sum of $134.50 on account of this contract of $384.50, and received a receipt therefor." This however must be taken in connection with the statement that the records showed no vote or order of the city council or board of aldermen. An officer who was not authorized to contract had no authority to ratify, and no such authority on the part of the city solicitor or other officer was shown, though in court the city solicitor would no doubt have the usual powers of an attorney. *Haskell* v. *New Bedford*, 108 Mass. 208. *Savage* v. *Blanchard*, 148 Mass. 348. And the acceptance and use of the building by the city do not bind it to pay for extra or unauthorized work done upon it, though the same is beneficial. The city could reject and decline to use the building on this ground, and it was not bound to take out such extra or unauthorized work. *Stuart* v. *Cambridge*, 125 Mass. 102. *Hayward* v. *North Bridgewater School District*, 2 Cush. 419. See also, as to work done on roads, *Blanchard* v. *Ayer*, 148 Mass. 174; *Bean* v. *Hyde Park*, 143 Mass. 245; *Clark* v. *Russell*, 116 Mass. 455; *Keyes* v. *Westford*, 17 Pick. 273; *Loker* v. *Brookline*, 13 Pick. 343; and on the general subject, see Dillon, Mun. Corp. (4th ed.) §§ 464–466, and cases cited.

The result is, that upon the facts reported the jury would not have been justified in finding for the plaintiff, and according to the terms of the report the entry must be,

Judgment for the defendant.

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HENRY C. KENDALL *vs.* LYDIA C. CLAPP.

Suffolk. November 14, 1894. — February 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Devise of an Estate in Fee Simple — Statute.

A devise by a testator to his wife of all his real property, "for her sole use and comfort during her natural life, and to her heirs and assigns forever," gives an estate in fee simple; and the provisions of Pub. Sts. c. 126, § 4, do not apply.

CONTRACT, to recover money paid by the plaintiff to the defendant under an agreement for the purchase and sale of real estate, on the ground that the title thereto was defective.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, upon agreed facts, which so far as material appear in the opinion.

J. D. Colt, for the plaintiff.

P. B. Watson, for the defendant.

BARKER, J. The plaintiff contends that the deed tendered to him conveys less than the fee, because the provisions of Pub. Sts. c. 126, § 4, apply to the devise under which the defendant holds. That statute has no application when the language of a devise shows that the intention of the testator was to give a fee. *Weld* v. *Williams*, 13 Met. 486, 496. *Barton* v. *Bigelow*, 4 Gray, 353, 357. *Hayward* v. *Howe*, 12 Gray, 49. *Trumbull* v. *Trumbull*, 149 Mass. 200. For the statute to operate there must be a creation of an estate for life, and then a devise or a grant in remainder to the heirs of the life tenant. As we construe the devise under which the defendant holds, it gives her the fee, and does not create a life estate in her, nor a remainder in her heirs.

The testator gives and devises to his wife by name all his real property, "for her sole use and comfort during her natural life, and to her heirs and assigns forever." The words "heirs and assigns" are the usual technical words in a deed to signify a fee, and, although unnecessary for that purpose in a will, are commonly used in wills with the same meaning. The use of the word "assigns" implies that she has the power of disposal.

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The absence before the words "to her heirs and assigns forever" of technical phrases, such as "after her death," or "in remainder," commonly employed to denote a devise or gift in remainder, and also the fact that the whole limitation is in an unbroken sentence, lead to the same result. We think the words "for her sole use and comfort during her natural life," as used by the testator, were not meant by him to cut down his devise, or to make an estate for life, but to emphasize his intention that she should have the sole and full benefit of the property given, which included personalty as well as realty. So far as circumstances stated in the agreed facts are competent for our consideration, they do not militate against the construction which we put upon the language of the testator's devise. The result is, that the deed tendered would, if accepted, have conveyed a fee to the plaintiff, and he has no right to recover the purchase money. *Judgment for the defendant affirmed.*

EDMUND BRICKETT *vs.* WILLIAM H. DOWNS.

Middlesex. November 16, 1894. — February 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Partnership — Fraud — Action by Assignee in Insolvency — Statute.

The reception of property of a partnership from one of the partners in payment of his personal debt, without the consent of his copartner, is a fraud upon the partnership and is void against the other partner, and the latter, having succeeded to all the rights of the assignee in insolvency and of the firm, is free from the embarrassment which would attend an attempt by the members of the firm to maintain an action jointly in their own names, and may, under Pub. Sts. c. 157, § 109, recover the full amount of the debt, as the assignee could have done if it had not been sold.

CONTRACT, for coal sold and delivered by the firm of Shorey and Brickett to the defendant. Answer: 1. A general denial. 2. Payment.

At the trial in the Superior Court, without a jury, before *Sheldon*, J., there was evidence tending to show that the plaintiff and Charles E. Shorey were copartners in Lowell in the coal

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business; that the defendant was a dentist practising in the same city; that Shorey and Brickett went into insolvency, and an assignee was appointed; and that, after the usual course in insolvency, the assignee sold the books and accounts of the firm to the plaintiff, who sued the defendant in the present action, under the provisions of Pub. Sts. c. 157, § 109.

Brickett testified that he took the order for one ton of coal from the defendant by telephone. The defendant testified that he had no recollection of this; that he ordered coal personally from Shorey; and that Shorey was having teeth fixed in the defendant's office, and proposed that the defendant take coal in part payment for dental work done and to be done for Shorey and his family by the defendant, and the defendant assented. At that time Shorey owed the defendant from twenty-three to twenty-seven dollars, and the defendant soon afterwards did work that increased the bill to thirty-eight dollars and seventy-five cents. The defendant also testified that he received the coal in part payment of his bill for dental work; that he saw the books of account of Shorey and Brickett, and he thought that credit was given him for the dental work on those books, and that his account was balanced thereon. He further testified that he knew that the coal came from Shorey and Brickett, and knew that Shorey was a partner in the firm.

Shorey testified that he delivered coal, as per agreement, to the amount of twenty-four dollars and sixty-five cents, in part payment of the defendant's dental bill, then amounting to twenty-seven or twenty-eight dollars; that he drew off a series of accounts for Shorey and Brickett's clerk to charge off to himself, and supposed the defendant's account was among them; that he thought the account between the defendant and himself was fully settled; and, although he had no distinct recollection of giving a receipted bill to the defendant, yet he thought he did, and had no recollection of taking a receipted bill from him.

The plaintiff testified that he never knew about the arrangement made by Shorey with the defendant until he heard the defendant testify to it.

The defendant asked the judge to rule that, on the evidence, the plaintiff could not recover. The judge refused so to rule,

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said that there was no evidence of actual fraud on the part of the defendant, and ruled, as requested by the plaintiff, that, if Shorey, a member of the firm of Shorey and Brickett, and the defendant, without the knowledge or consent of Brickett, agreed that the defendant, a dentist, should buy coal from the firm, and pay therefor with professional services to be rendered Shorey or his family, and the coal declared on in this action was delivered thereunder to the defendant without any knowledge of said agreement on the part of Brickett, or his assent thereto, and dental services to an amount equal to or exceeding the price of the coal were so rendered Shorey or his family, then the agreement was a fraud on the firm, the dental services were no defence to the action, and the plaintiff could recover. The defendant alleged exceptions.

G. W. Poore, for the defendant.

C. H. McIntire, for the plaintiff.

KNOWLTON, J. The arrangement made between the defendant and Shorey, a member of the firm of Shorey and Brickett, that the coal delivered to the defendant by Shorey and Brickett should be paid for by setting off the private debt of Shorey to the defendant, and the settlement made on this basis between Shorey and the defendant without the knowledge of Brickett, were a fraud upon the firm, and are of no effect as against the plaintiff. The finding of the judge, that there was no evidence of actual fraud on the part of the defendant, must mean that there was no evidence of a wrongful purpose, but only evidence of the legal fraud set out in the bill of exceptions. The facts proved are *prima facie* evidence of fraud upon the partnership, which requires a finding in favor of the plaintiff, unless facts or circumstances are shown which might justify the defendant in believing that the settlement was authorized expressly or impliedly by the other partner. To receive property of a partnership from one of the partners in payment of his personal debt, without the consent of his copartner, is no less a fraud upon the partnership than to pay a debt due the firm by doing or furnishing something for the personal benefit of one of its members. Such an arrangement accompanying the receipt of partnership property would be void against the other partner, and would leave the party receiving the property liable upon an

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implied contract to pay the firm its value. *Homer* v. *Wood*, 11 Cush. 62. *Williams* v. *Brimhall*, 18 Gray, 462. *Tay* v. *Ladd*, 15 Gray, 296. *Farley* v. *Lovell*, 103 Mass. 387. *Locke* v. *Lewis*, 124 Mass. 1.

The reasons for holding that the plaintiff could not maintain his action in *Homer* v. *Wood*, *ubi supra*, do not apply to this case. This plaintiff, in order to maintain his action, is not obliged to set up the fraud of a person joined with him as co-plaintiff on the record. He succeeds to all the rights of the assignee and of the firm, and he is free from the embarrassment which would attend an attempt by the members of the firm to maintain an action jointly in their own names. By Pub. Sts. c. 157, § 109, it is expressly provided that "suits upon claims sold by assignees shall be brought in the name of the purchasers." The defendant's settlement with Shorey being ineffectual to bar the debt, the plaintiff can recover the full amount of the debt, as the assignee could have done if it had not been sold.

Exceptions overruled.

SARAH M. STRATTON *vs.* CHARLES T. SEAVERNS.

Middlesex. December 4, 1894. — February 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Equity — Decree — Amendment — Meaning of Allegation.

When a decree on its face is consistent with law, and may have been justified by the evidence, and when it agrees with the frame and carries out the plain object of the bill, this court will not go into nice verbal criticism of the bill for the first time on appeal.

A bill in equity was brought to restrain the defendant from disclosing processes and formulas which in his contract with the plaintiff he had agreed not to divulge to any person or corporation, and the decree recited that matrices made by the defendant from the formulas and processes "as manufactured prior to the filing of the bill and to the hearing of the cause" came within the agreement. *Held*, that the words quoted referred to one kind of matrix only, the manufacture of which was begun before the date of the bill and was continued up to the hearing, and that the allegation that the defendant's matrix was covered by his agreement was of the same scope as the decree, although the decree used the plural instead of the singular.

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BILL IN EQUITY, filed on January 16, 1894, alleging that on February 15, 1893, the plaintiff and the defendant executed a certain agreement in writing, to the effect that the plaintiff's testator, having "invented certain new processes and formulas for the manufacture of slip soles and other articles," gave the defendant "free and exclusive license and right to manufacture, sell, and place upon the market in this country and elsewhere said slip soles, and all other articles which may be made under said processes and formulas," and agreed "to impart to him knowledge of said processes and formulas as fully as she has the same, and to impart knowledge of the same to no one else"; and the defendant agreed to manufacture and place the same upon the market, to "under no circumstances whatever and in no manner whatever divulge, intimate, or make known to any person or corporation said processes or formulas, or any part thereof," and render accounts, and pay the plaintiff a certain proportion of the net profits, the last clause of the agreement being as follows: "It is expressly agreed by the parties hereto that any article manufactured under any improvement in said formulas and processes, or to take the place of any articles manufactured thereunder or to be used in connection therewith, with which the said party of the second part is in any way connected, shall come within the provisions of this agreement; and royalty to the said amount shall be paid thereon to the said party of the first part, her representatives and assigns, by the said party of the second part."

The bill further alleged that in accordance with the provisions of the agreement she had imparted to the defendant knowledge of the processes and formulas therein referred to as fully as she had the same, and had imparted knowledge of the same to no one else, and had performed all things in the agreement specified on her part to be performed; that the defendant had rendered to the plaintiff no accounts of slip soles and other articles manufactured, and placed upon the market, and sold by him; that he had represented to the plaintiff that he had sold none of the soles, and had made no use thereof, or of the formulas and processes; that, as the plaintiff believed, the defendant and persons employed by and acting with him had made improvements in said formulas and processes, and had developed therefrom a

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process of making a matrix for use in printing, which was of great value; that the defendant had contracted, or was about to contract, with certain parties or corporations in the State of New York, their names being unknown to the plaintiff, for the sale of said matrix and the processes and formulas for making the same, and to disclose to them the whole or a part of the formulas and processes referred to and covered by the agreement; that as the plaintiff believed, said matrix and the processes and formulas for making the same were covered by the agreement, and the plaintiff was entitled to the interest therein provided for in the agreement; that, as she believed, the defendant intended fraudulently to deprive her of her interest therein, and of her rights under the contract; and that, as she believed, the defendant was financially irresponsible, so that a judgment for damages for a breach of the agreement would be of little or no value.

The prayer of the bill was that the defendant, his servants and agents, might be enjoined from disclosing the processes and formulas, or any part thereof, to any person or corporation, and from in any way violating the provisions of the agreement; and that after due hearing the injunction might be made permanent, and that the defendant might be required to account and pay to the plaintiff any and all moneys to which she might be entitled under the agreement.

The answer of the defendant was, that since the date of the contract he had made all reasonable and possible efforts to introduce on the market the products of the formulas and processes referred to in the contract, and to sell the same, but without success; and that neither he nor the plaintiff had made or suggested any other article of merchandise or any practical use for or to which the formulas and processes could be used and applied; and he therefore admitted that he had not rendered accounts as alleged in the bill.

He further alleged that he had no intention of divulging or communicating the formulas and processes, or any part thereof, or in any other way violating the terms of the agreement, and that he had not contracted nor was about to contract with parties, as alleged in the bill, to disclose the whole or any part of the formulas and processes.

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He furthermore denied that he and persons employed by and acting with him had made improvements in the formulas and processes, or that they had developed therefrom a process for making a matrix for use in printing, or that the matrix referred to in the bill and the processes and formulas for making the same were covered by the agreement.

The court made a decree adjudging that the defendant be perpetually enjoined from in any way disclosing or divulging the processes and formulas referred to in or covered by the agreement, a copy whereof was annexed to the plaintiff's bill of complaint, or any part thereof; that the matrices, as devised and improved by the defendant, as manufactured prior to the filing of the bill and to the hearing of the cause, came within the last clause of said agreement, and the plaintiff's rights therein under said agreement were thereby established; that accounts under said agreement be taken when sales of said matrices, or of other articles covered by said agreement, were made; and that the plaintiff recover the costs of suit, to be taxed by the clerk; and the defendant appealed.

S. H. Tyng, for the defendant.

J. R. Smith, for the plaintiff.

HOLMES, J. When, as in this case, a decree on its face is consistent with law, and may have been justified by the evidence, and when it agrees with the frame and carries out the plain object of the bill, we are not disposed to go into nice verbal criticism of the bill for the first time on appeal. The only question before us worth mentioning is raised by the clause of the decree that the matrices, "as manufactured prior to the filing of the bill and to the hearing of the cause," come within the defendant's agreement. It is assumed on behalf of the defendant that the words quoted mean that he has made two kinds of matrix, one manufactured before the filing of the bill, the other after, and it is objected that the latter cannot be dealt with in the decree without a supplemental amendment to the bill. We do not read the words as having the meaning supposed. We understand them to refer to one kind of matrix only, the manufacture of which was begun before the date of the bill, and was continued up to the hearing.

The bill alleges that the defendant's matrix is covered by his

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agreement. This allegation is of the same scope as the decree, although the decree uses the plural. The bill refers to the species, the decree to the members of the species. The allegation is not an allegation of matter of law only. *Windram* v. *French*, 151 Mass. 547, 551. If the defendant had wanted more information as to how the matrix was covered by his agreement, he should have sought it earlier, although we do not mean to intimate that he would have succeeded if he had done so in a case like this. *Decree affirmed.*

GEORGE E. GRAY *vs.* INHABITANTS OF EVERETT.

Middlesex. December 13, 1894. — February 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Petition for Damages for repairing Highway — Amendment — Statute.

The Superior Court has power to allow an amendment changing a petition under Pub. Sts. c. 52, § 16, for damage to property by reason of any raising, lowering, or other act done for the purpose of repairing a way, into a petition under Pub. Sts. c. 49, § 79, for the assessment of damages occasioned by the laying out of the way, if, when the proceedings in the Superior Court were begun, the petitioner had the right to the latter remedy, and if the work relied upon in support of the amended petition was the cause of action relied upon in the petition originally filed.

BARKER, J. In our opinion the Superior Court has power to allow an amendment changing a petition, under Pub. Sts. c. 52, § 16, for damage to property by reason of any raising, lowering, or other act done for the purpose of repairing a way, into a petition under Pub. Sts. c. 49, § 79, for the assessment of damages occasioned by the laying out of the way, if, when the proceedings in the Superior Court were begun, the petitioner had the right to the latter remedy, and if the work upon the way relied upon in support of the amended petition was the cause of action relied upon in the petition originally filed. Such petitions are of the same general character, and are to be tried at the same bar and in the same manner. The same acts of the town upon the surface of the ground within the limits of the

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way will sustain one petition if they are repairs of a pre-existing way, and the other petition if they are done in the construction of a way newly laid out. In both petitions the assertions of the petitioner are that the acts were legal, were done by the authority of the respondent, and have damaged the petitioner's property. When, as in the present case, the way was in use as an open street before it was laid out as a public way, and continued to be used without alteration for some months thereafter before the change of grade by which the petitioner's property was damaged, the error of treating the change in the surface of the street as work done in repairs rather than in original construction is not of a kind to prejudice the respondent. While the allowance of the amendment will deprive the respondent of a defence purely technical, it will compel the payment of damages actually sustained, and for which the respondent was answerable when the petition was brought, and in the court where it was brought. It is settled that such petitions are within the spirit of the statutes of amendments. *Grand Junction Railroad* v. *County Commissioners*, 14 Gray, 553, 564, and cases cited. *Winchester* v. *County Commissioners*, 114 Mass. 481. *Porter* v. *Newton*, 133 Mass. 56. *Sanger* v. *Newton*, 134 Mass. 308. The respondent relies upon the case of *Peterson* v. *Waltham*, 150 Mass. 564, in which it was held that the Superior Court had no power to allow an action of tort for the taking of the plaintiff's land and laying out streets over it to be changed into a petition for a jury to assess damages for land taken for a public way. But that case is easily distinguishable from the present one. There the two remedies were dissimilar. The action of tort went upon the theory that the acts of the city were unlawful. It was one of the three common forms of personal actions. The petition went upon the theory that the acts of the city were lawful, and it was not a personal action, but a petition for damages. In the action of tort, proof of the acts of the city would be a perfect defence upon the merits, while in the petition the same proof would tend to support the petition. As we have seen, the case at bar stands very differently. Both petitions are of the same general character, both seek damages for the same physical acts, and both are upon the theory that the acts of the respondent are legal. We regard the mistake as in the nature of an ordi-

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nary variance, the amendment of which it was within the power of the court to allow. *Exceptions overruled.*

G. E. Smith, for the respondent.

F. J. Daggett, for the petitioner.

NELLIE CHESEBRO *vs.* JOSEPH BARME & another.

Norfolk. December 14, 1894. — February 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Poor Debtor — Execution — Arrest — Exceptions — Action — Trial Justice — Breach of Recognizance — Statute.

When a judgment is recovered in a court having jurisdiction, and the execution thereon is issued by the proper officer, irregularities either in the mode of issuing it or in the execution itself do not make it void; and it may be dealt with by the court upon motion of either party, and amended or annulled as justice may require; and service of it, if it is not annulled, or service restrained or suspended, is not invalid.

An alias execution, issued before the return day of the original execution, is valid, and the arrest thereon of the debtor after such return day is lawful.

A point not raised at the trial is not open upon a bill of exceptions.

The fact that, at the commencement of an action upon a poor debtor's recognizance, the execution on which he was arrested had not been returned into court, is no bar to the action.

In an action upon a poor debtor's recognizance, the question whether a trial justice court is a court of record is immaterial.

If, at the time and place appointed by a trial justice for the hearing of a person who has applied to take the oath for the relief of poor debtors, the debtor and creditor both appear, but the magistrate fails to appear, and the debtor does not procure within the hour the attendance of some other duly qualified official to adjourn the hearing, or himself give a new notice within three days of his intention to submit himself to examination, as provided by St. 1887, c. 442, § 8, there is a breach of his recognizance; and St. 1889, c. 415, does not relieve the debtor of the obligation to secure a proper continuance, if no person qualified to conduct the examination appears.

CONTRACT, upon a poor debtor's recognizance, entered into by the first named defendant as principal and by the other defendant as surety, and containing the usual conditions. Trial in the Superior Court, without a jury, before *Blodgett*, J., who found for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

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C. P. Sullivan, for the first named defendant.

R. H. O. Schulz, for the other defendant.

C. F. Jenney & E. C. Jenney, for the plaintiff.

BARKER, J. The first execution against the debtor was issued on July 1, 1892, and was returned into court unsatisfied on August 26, 1892, when an alias was issued, upon which the debtor was arrested on September 2, 1892. The defendants contend that the alias was void, because issued before the return day of the original execution.

By our statute, Pub. Sts. c. 171, § 22, an execution must be made returnable in sixty days from its date. This is not equivalent to saying that an execution can be returned to court only upon its statute return day. The purpose of the enactment is to make a reasonable limit of time beyond which the process shall not authorize the commencement of proceedings for the collection of the judgment. But service begun before the return day may be completed thereafter. Pub. Sts. c. 171, § 55. The officer's return of service upon the execution, and the return of the execution into court, are different matters. He may indorse upon the execution any true statement of his acts under it without waiting for the return day, or after that day; and there is no prohibition against returning the execution into court before or after the return day. If it is returned into court before the return day, bail taken in the action cannot be held, nor can a trustee charged in the action be held upon *scire facias*. *Niles* v. *Field*, 2 Met. 327. *Bull* v. *Clarke*, 2 Met. 587. *Rowland* v. *Seymour*, 2 Met. 590. *Adams* v. *Cummiskey*, 4 Cush. 420. But this is because bail may surrender their principal at any time before the return day, and the death of the principal during that period discharges the bail; and in the case of a trustee, because the execution may be satisfied otherwise than by the goods or property for which the trustee was charged.

There are instances in which arrests and levies made upon executions prematurely issued have been held void; but in those instances not only were the executions prematurely issued, but the arrest or the levy was made before the time when an execution could be legally issued. In *Briggs* v. *Wardwell*, 10 Mass. 356, a justice of the peace who had issued an execution in two or three hours after he had rendered judgment was held liable in

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trespass for the arrest of the defendant; but from the statement that he was arrested "a few hours earlier than by law he should have been," it is apparent that the arrest was made before execution could have been lawfully issued. So in *Penniman* v. *Cole*, 8 Met. 496, where the execution issued before the lapse of the prescribed twenty-four hours after the entry of judgment, the levy which was held void was also made before the expiration of the same twenty-four hours. There is good authority that executions prematurely issued, if not acted upon until after the time when an execution might legally be issued, are not void, and that proceedings under them are valid. *Blaine* v. *The Charles Carter*, 4 Cranch, 328. *Stewart* v. *Stocker*, 13 S. & R. 199. *Scribner* v. *Whitcher*, 6 N. H. 63. And in *Rammel* v. *Watson*, 2 Vroom, 281, and in *Lovegrove* v. *Brown*, 60 Maine, 592, the original execution was returned and an alias issued before the return day of the original, and was held not to be void. There may no doubt be executions which, although prepared and signed by the clerk and under the seal of the court, are void; as in *Albee* v. *Ward*, 8 Mass. 79, where an execution issued by a justice of the peace upon a recognizance misrecited the recognizance both as to the sum and as to the time when it was entered into. So in *Hammatt* v. *Wyman*, 9 Mass. 138, where the execution was discharged by the full satisfaction of the judgment by one judgment debtor, although no entry of satisfaction was made. So in *King* v. *Goodwin*, 16 Mass. 63, and in *Kennedy* v. *Duncklee*, 1 Gray, 65, where when the execution issued there had been a taking of the body of the judgment debtor upon a previous execution on the same judgment. So in *Winslow* v. *Hathaway*, 1 Pick. 211, where an execution not intended to be delivered was improperly given out by some employee of the clerk's office, and was served notwithstanding that the judge who held the court was applied to and wrote that the execution must not be served. So in *Palmer* v. *Crosby*, 11 Gray, 46, where the execution purported on its face to be upon a judgment entered by a tribunal which had no existence.

But the general principle is, that, when the judgment is recovered in a court having jurisdiction, and the execution is issued by the proper officer, irregularities either in the mode of issuing it or in the document itself do not make it void; and

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that it may be dealt with by the court upon motion of either party, and amended or annulled as justice may require, and that service of it, if it is not annulled, or service restrained or suspended, is not invalid. *Johnson* v. *Harvey*, 4 Mass. 483. *Ranlet* v. *Warren*, 7 Mass. 477. *Blanchard* v. *Waters*, 10 Met. 185. *Kennedy* v. *Duncklee*, 1 Gray, 65. *Nims* v. *Spurr*, 138 Mass. 209. *Blaine* v. *The Charles Carter*, 4 Cranch, 328. *Scribner* v. *Whitcher*, 6 N. H. 63, and cases cited. *Bryant* v. *Johnson*, 24 Maine, 304. *Stewart* v. *Stocker*, 13 S. & R. 199. *Lowber's appeal*, 8 W. & S. 387. *Rammel* v. *Watson*, 2 Vroom, 281. *Morgan* v. *Evans*, 72 Ill. 586. So an officer who holds an execution in common form, issued by a court having jurisdiction, is protected by it in making the service which it orders him to make. *Smith* v. *Bowker*, 1 Mass. 76. *Wilmarth* v. *Burt*, 7 Met. 257.

If in the present case we should assume that the issuing of the alias on which the debtor was arrested before the return day of the original execution was irregular, and that until after the return day of the original the alias would have been superseded upon the debtor's motion, or even that the alias was void until the return day of the original had passed, there still would be no reason for holding that the alias was void after the return day of the original. No one had been injured by the irregularity, if the course pursued was irregular. The debtor was not arrested until after the return day of the original execution. Even the small fee for the alias must have been added to the costs if the original had been returned to court on its return day, and the alias then issued instead of before; and we need not consider what would be the effect of swelling costs by numerous returns and fresh writs. In our opinion, the alias upon which the debtor was arrested was valid at the time of his arrest.

The points raised by the defendants as to the effect of the Fourth and Fourteenth Articles of the Amendments of the Constitution of the United States are not properly before us. They now contend that the debtor's arrest was illegal, because there was no affidavit or affirmation in support of the arrest, and that, because another course is prescribed for dealing with women judgment debtors than with men, men are thus deprived of the equal protection of the laws. But these points were not raised

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at the trial in the Superior Court, are not brought to this court by the bill of exceptions, and cannot be taken in this court upon the hearing of the bill.

The ruling requested, that the plaintiff cannot recover upon the recognizance because at the commencement of this action the execution upon which the debtor had been arrested had not been returned to court, was rightly refused. His arrest and the giving of the recognizance were both before the return day. By giving the recognizance he was discharged from the arrest, and the proceedings in which he afterwards made default were upon his own application for the benefit of the provisions for the relief of poor debtors. If he had made no default in those proceedings, and they had ended in a denial of his application, it would have been incumbent upon the plaintiff, if he wished to have the debtor again arrested, to have a proper execution present, and an officer ready to serve it by making the fresh arrest. But until that time the creditor was not bound to have an execution upon which the debtor could be taken anew, and the facts that the execution upon which he had been arrested was not returned into court upon the return day, and that a *pluries* was not issued, are immaterial. The debtor made default before the time when it was necessary for the creditor to have an execution upon which the debtor could be arrested anew. The plaintiff's right of action accrued by reason of the default, and, so long as there was no satisfaction of the judgment or levy of property to satisfy it in the mean time, the condition of the execution subsequent to the giving of the recognizance never became material. *Fuller* v. *Meehan*, 118 Mass. 135. *Simpson* v. *Trivett*, 120 Mass. 147. *Morgan* v. *Curley*, 142 Mass. 107. *Damon* v. *Carroll*, *post*, 407.

Whether a trial justice court is a court of record was immaterial to the case upon trial, and the ruling requested by the defendants upon that subject was therefore rightly refused.

The remaining contention of the defendants is that the debtor made no default. Within thirty days from his arrest he made application to take the oath for the relief of poor debtors, and caused notice to be given that he would appear and deliver himself up for examination at eight o'clock in the morning on September 29, 1892, before one Terry, a trial justice of Norfolk,

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at the office of the trial justice in Hyde Park. At the time and place named the debtor appeared and submitted himself to an examination before the trial justice, who was there present, and the creditor also appeared by attorney, and the hearing was duly continued from time to time until January 7, 1893, at eight o'clock in the morning. On that day the debtor and the creditor by attorney both duly appeared within the hour, and there waited for an hour or more, but the trial justice did not appear. No one appears to have been called in to adjourn the proceedings, nor does any new notice of the debtor's intention to submit himself to examination appear to have been given.

Whether the notice given by the trial justice that the debtor would appear and deliver himself up for examination at eight o'clock in the morning was good, notwithstanding the statute, (Pub. Sts. c. 155, § 20,) which provides that writs and processes before such magistrate may be made returnable "not earlier than nine o'clock in the forenoon," we need not consider, as we are of opinion that there was in another particular a breach of the recognizance. The defendants assume that the failure of the trial justice to attend at the adjourned hearing was due to his negligence. But no such statement is found in the bill of exceptions, and it can hardly be assumed. We however consider that the cause of his absence is immaterial. Whatever may have been the cause of the non-appearance of the trial justice, it was incumbent upon the debtor, if he would keep his recognizance, either to procure within the hour some other duly qualified official to come in and adjourn the hearing, or, failing in procuring such an adjournment, himself to give a new notice within three days, as provided by St. 1887, c. 442, § 3. The law is settled that it is incumbent upon the debtor to see that the magistrate is in attendance. *Hooper* v. *Cox*, 117 Mass. 1, and cases cited. *Hills* v. *Jones*, 122 Mass. 412. *Everett* v. *Henderson*, 150 Mass. 411, 412. The defendants contend that the effect of St. 1889, c. 415, relating to procedure in poor debtor matters, has relieved the debtor of the obligation to have a competent court or magistrate present at the time and place to which his examination has been continued, and that the debtor performed his whole duty by being himself present. That statute, by enacting that, save when held by trial justices, such examina-

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tions shall be by courts rather than by magistrates, no doubt lessened the chance that debtors seeking the benefit of the oath should find themselves in danger of making default because of the non-appearance of the person before whom the examination was to be held. But it contains no express provision, and no implication, that it was intended to change the settled rule, which placed upon the debtor the burden of securing a proper continuance, if no person qualified to conduct the examination appeared. If there had been an intention so to change the law the Legislature would have said so, and would have repealed St. 1887, c. 442, § 3, which was the most recent statute, dealing expressly with the subject and affirming the settled rule, while it gave to debtors an additional means of complying with it. As the debtor failed to have the trial justice or any other qualified officer present at the time and place to which the hearing was adjourned, and also failed to provide for a continuance of the hearing by giving a new notice within three days, he thereby made a default which gives the plaintiff the right to recover in this action upon the recognizance. *Exceptions overruled.*

J. MABO HARRIMAN *vs.* WOBURN ELECTRIC LIGHT COMPANY & others.

Suffolk. December 13, 1894. — February 27, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Mortgage — "Recorded" — Statute — Insolvent Debtor — After-acquired Property — Possession by Mortgagee — Appointment of Receiver — Decree — Equity.

A mortgage covering both real estate and personal property, given to a trustee to secure the payment of an issue of negotiable bonds, and duly recorded with the records of mortgages of personal property but not recorded in the registry of deeds until more than three years after its date, is a "mortgage of real estate," within the meaning of St. 1888, c. 398, and the real estate cannot be held under the mortgage as against an assignee in insolvency of the estate of the mortgagor appointed in proceedings in insolvency begun before the expiration of a year from the recording of the mortgage.

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A mortgage of all its real estate and personal property "now owned or hereafter to be acquired" was given by a corporation to a trustee to secure the payment of an issue of bonds. The trustee, which was a corporation, became insolvent, and its property went into the hands of a receiver. A holder of some of the bonds brought a bill in equity for the appointment of a receiver of the corporation issuing them, alleging its insolvency, for the appointment of a trustee to succeed the insolvent trustee, and for a foreclosure of the mortgage. A receiver was thereupon appointed, the decree reciting that "It is hereby declared, upon agreement of the parties, that this decree is without prejudice to any proceedings in insolvency, voluntary or involuntary, by or against the defendant"; and, referring to the possible appointment of an assignee in such proceedings, and providing that in such case the assets should remain in the hands of the receiver until the further order of the court, it declared that this was to the end, among other things, "that the value of the assets of said corporation may, so far as possible, be preserved unimpaired for the benefit of all persons entitled thereto, and at the same time any supposed rights depending on the appointment of an assignee in insolvency may not be prevented by these proceedings from springing into existence." Subsequently voluntary proceedings in insolvency were begun by the corporation, and an assignee was appointed. No possession was taken by the mortgagee of any personal property acquired by the corporation after making the mortgage. *Held*, that the title to such after-acquired property passed to the assignee in insolvency.

BILL IN EQUITY, filed June 7, 1894, for the appointment of a receiver of the defendant corporation; for the appointment of a trustee, as successor of the trustee named therein, to act under a mortgage of "all its estate, real, personal, and mixed, of whatever nature or description, now owned or hereafter to be acquired," given by the corporation to secure the payment of an issue of bonds, two of which were held by the plaintiff; and for a foreclosure of the mortgage. Hearing before *Morton*, J., who reserved the case for the consideration of the full court; such decree to be entered as law and justice might require. The material facts appear in the opinion.

The case was argued at the bar in December, 1894, and afterwards was submitted on the briefs to all the judges.

H. G. Nichols & S. L. Whipple, for the plaintiff.

R. F. Herrick, (*G. Cunningham* with him,) for the defendants.

KNOWLTON, J. The questions argued in this case relate to the validity of the mortgage as against assignees in insolvency, in view of the fact that it was not recorded in the registry of deeds until more than three years after its date, and in view of the further fact that there is after-acquired property covered by its provisions of which possession has never been taken by the mortgagee. The mortgage was made on August 19, 1890. It

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includes real estate, and also personal property situated in three different towns. It was duly recorded with the records of personal property mortgages in each of these towns, but it was not recorded in the registry of deeds until September 5, 1893. Voluntary proceedings in insolvency were begun by the mortgagor on July 2, 1894, and assignees were appointed, who have been made defendants in the suit, and who have filed a cross bill. The St. 1888, c. 393, is as follows: "A mortgage of real estate recorded more than four months after its date shall not be valid as against an assignee in insolvency of the estate of the mortgagor appointed in proceedings in insolvency begun at any time after the date of the mortgage, and before the expiration of one year from the recording thereof."

This is plainly a mortgage of real estate within the meaning of the statute, although it includes personal property also. Such an instrument given to a trustee to secure the payment of a large issue of negotiable bonds is a mortgage no less than if it were given to secure a promissory note of the mortgagor payable to the mortgagee. *Knight* v. *Boston*, 159 Mass. 551. The word "recorded" in the statute relates to the record made in the registry of deeds, where a mortgage of real estate, in order to be effectual, is required by law to be recorded. The validity of this instrument as a mortgage of real estate is not affected by its provisions in regard to personal property, or by the mortgagee's recording it with the record of mortgages of personal property. The provisions of the statute above quoted apply to the case, and the real estate cannot be held under the mortgage as against the assignees in insolvency.

The effect of a mortgage which purports to include property afterwards to be acquired is very fully considered in *Blanchard* v. *Cooke*, 144 Mass. 207, and it is there held that a covenant or agreement in regard to after-acquired property will become effectual for the security of the mortgagee if he takes and keeps possession of the property under his mortgage, but not otherwise. Formerly it was thought that such a covenant would take effect only if the mortgagor, as well as the mortgagee, acted under it. Under the more liberal doctrine of later cases, which does not require the delivery of the property by the mortgagor, it is well settled that, as against attaching creditors or assignees in insol-

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vency, the title does not pass nor the mortgage take effect upon the after-acquired property, either at law or in equity, unless possession is taken under it. The plaintiffs in the original bill concede that this is the law, and contend that the possession of the receiver appointed by the court should be deemed equivalent to a possession taken by the mortgagee. At the time this bill was brought, the trustee under the mortgage was an insolvent corporation, whose property was in the hands of a receiver appointed by the court. It is contended that there was at that time nobody legally qualified to take possession of the after-acquired property as mortgagee. Whether that be so or not, if a bill had been brought for the purpose of acquiring possession of this property in the interest of the bondholders, it might well be that the possession of a receiver subsequently appointed in the case would give effect to the provisions of the mortgage in regard to the after-acquired property; but there is nothing in the original bill to show that the plaintiffs were proceeding with any such purpose. There is nothing in the bill, and at the time of the appointment of the receiver there was nothing in any part of the proceedings, to indicate that there was any personal property in the possession of the mortgagor acquired after the date of the mortgage. The bill alleges only a paper title in the trustee for the benefit of the bondholders, and alleges the hopeless insolvency of the mortgagor, and asks for the appointment of a receiver for the protection of the rights of all parties. There is no suggestion that the rights of the bondholders depend upon any act done or to be done in regard to after-acquired property. The decree appointing the receiver is carefully guarded to protect the title and rights of the parties as they were when the bill was brought. At that time the mortgagee had acquired no title to the after-acquired property, but it was subject to the claims of creditors, or of an assignee in insolvency if one should be appointed. The decree contains these words: "It is hereby declared, upon agreement of the parties, that this decree is without prejudice to any proceedings in insolvency, voluntary or involuntary, by or against the defendant," etc. Referring to the possible appointment of an assignee in such proceedings, and providing that in such a case the assets shall remain in the hands of a receiver until the further order of the court, it declares that

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this is to the end, among other things, "that the value of the assets of said corporation may, so far as possible, be preserved unimpaired for the benefit of all persons entitled thereto, and at the same time any supposed rights depending upon the appointment of an assignee in insolvency may not be prevented by these proceedings from springing into existence." It is difficult to see how an intent to prevent prejudice to the rights of the general creditors by the appointment of a receiver could be more clearly expressed. Very likely the precise question now under consideration was not then before the court, and perhaps not in the minds of the counsel; but we must assume that the decree was carefully drawn to cover questions that might afterwards arise, whether then particularly thought of or not. The decree was made by agreement of all parties in interest who were present and desired to be heard, and it would be most unjust to hold that, by consenting to it, the corporation was deprived of the ownership of the after-acquired property for the benefit of its general creditors. A majority of the court are of opinion that upon this part of the case the decision must be in favor of the assignees.

Under the terms of the report, by agreement of parties, the case must be referred to a master to determine the property covered by the mortgage. *So ordered.*

MICHAEL CUNNINGHAM *vs.* MERRIMAC PAPER COMPANY.

Essex. December 14, 1894. — February 27, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Unsafe Appliance.

In an action for personal injuries occasioned to an employee by the falling on him of a door set in grooves which he was lifting by main strength, it appeared that the plaintiff knew that the door was not in the condition in which it was intended to be used and that it wanted the appliance which would make it safe, and that if he had notified the defendant's carpenter it would have been put in proper condition, but he had not notified him and it was not the carpenter's duty to inspect the door of his own motion. *Held*, that the plaintiff was not entitled to demand, instead of repairs, such secondary precautions as would make it safe to use the door in an unnatural way, and that the action could not be maintained.

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HOLMES, J. This is an action for personal injuries. At the trial, the judge directed a verdict for the defendant, and the case is here on exceptions. The plaintiff, a day laborer in the defendant's employ, was hurt by the falling out upon him of a sliding door. This door moved up and down in grooves, and in its proper state was balanced by weights fastened to it by ropes running over pulleys, like a common window, but at the time of the accident the weights were off the ropes. The plaintiff testified that the door had been in this condition for a long time, and that if the weights had been on he would not have been hurt, which last is plain. If he had notified the defendant's carpenter, there was evidence that the weights would have been replaced; but he had not notified him, and it was not the carpenter's duty to inspect the door of his own motion. Having occasion to go through the door, the plaintiff lifted it by main strength, and, as he was reaching for a stick to hold it up, it fell upon him.

On these facts we are of opinion that, whether it be said that the plaintiff took the risk, or that he was negligent, the ruling was right. The plaintiff knew that the door was not in the condition in which it was intended to be used, and that it wanted the appliance which would have made it safe. No doubt there was evidence that the grooves were defective, and it may be assumed that they could have been made so that they would have held the door even without the ropes and weights. But the door was not made to be used in that way, and the defendant was not bound to look out for its being used in that way. The defendant's negligence, as a ground of liability, begins and ends with not having the weights on and the door in proper running condition. As the plaintiff understood as well as any one what the actual condition was, and probably might have had it mended, he was not entitled to demand, instead of repairs, such further and secondary precautions as would make it safe for him to go on and use the defective door in an unnatural way.

Exceptions overruled.

C. A. DeCourcy & W. Coulson, for the plaintiff.

W. I. Badger, for the defendant.

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FLORENCE SCANNAL *vs.* CITY OF CAMBRIDGE.

Middlesex. January 8, 1895. — February 27, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Defective Highway — Absence of Barrier — Law and Fact — Action.

In an action against a city for personal injuries occasioned by an alleged defect in a highway, the question whether there is a dangerous place or object so near the line of travel that travellers will be likely to be injured by it unless a railing is provided for their protection, is ordinarily one of fact for the jury; but if, in the view of the evidence most favorable to the plaintiff, the risk of injury is so small that it would be unreasonable to require the city to provide the railing, the court will decide it as a question of law, and order a verdict for the defendant.

Earth was dug out of a street in a city in the construction of a sewer, and dumped upon an adjacent field, which was somewhat lower than the street, and the fence on the side was taken away for a little distance. There was a sidewalk of gravel over eight feet wide nearly on a level with the street, with little depth of gutter to separate it from the travelled part of the way. The earth so dumped in the field had settled so as to be about two inches lower than the sidewalk, and sloped but very little for a few feet, then sloped more decidedly until, at about seventeen feet from the line of the street, it fell off quite rapidly from the edge of the embankment about two and a half feet to the level of the field. This earth had been graded somewhat imperfectly, and it was not very rough. A person was driving along the way in the daytime, when his horse became frightened, wheeled suddenly to the right, went across the sidewalk into the field over the soft earth, and then swerved to the left, causing the right wheels of the wagon to be at a lower level than the left wheels, and descended the embankment, the driver being thrown out and injured. *Held*, in an action against the city for his injury, that there was no evidence which would warrant the jury in finding the way to be defective.

If a traveller on a highway in a city loses complete control of the horse which he is driving, and such loss of control is not momentary only, but is a permanent condition, and he is injured, he cannot maintain an action against the city for his injury, although the way is defective.

TORT, for personal injuries occasioned to the plaintiff by an alleged defect in a highway in the defendant city. Trial in the Superior Court, before *Mason*, C. J., who ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

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J. J. Scott, for the plaintiff.

G. A. A. Pevey, for the defendant.

KNOWLTON, J. This case presents two questions: first, whether there was evidence which would warrant the jury in finding the highway defective for want of a railing; and, secondly, whether the accident happened by reason of the plaintiff's horse being beyond his control.

Portland Street, near the place of the accident, is fifty feet wide, and runs nearly north and south. The adjacent land on each side is somewhat lower than the street, and the fence on the westerly side had been taken away for a little distance, and earth dug out in the construction of the metropolitan sewer had been carried into the field and dumped there. There is a sidewalk of gravel eight feet and eight inches wide nearly on a level with the street, with little depth of gutter to separate it from the travelled part of the way. The earth which had been dumped in the field started next the sidewalk, nearly at the level of the walk, although it had settled so as to be about two inches lower than the walk, and sloped but very little for a few feet, and then sloped more rapidly until, at about seventeen feet from the line of the street, it fell off quite rapidly from the edge of the embankment about two and one half feet to the level of the field. The earth dumped there had been graded somewhat, but not perfectly, and it was not very rough. The plaintiff, a pedler, was driving along in a southerly direction at about two o'clock in the afternoon, when his horse was frightened at seeing another horse in the field on the easterly side, at a point considerably below the level of the street, and wheeled suddenly to the right, went across the sidewalk into the field over the soft earth, and then swerved to the left, causing the right wheels of the wagon to be at a lower level than the left wheels, and as he descended the embankment the seat was thrown out and the plaintiff with it. The plaintiff testified that "he had no more control of the horse than a baby would have; that he tried to pull the horse in and to steer him out into the street again, but he could not do it." The plaintiff also testified that from the edge of the highway to the place where he went over was from fifteen to seventeen feet. The engineer — who made measurements and prepared a plan from information given by one Stetson, who

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pointed out to him the place where the wagon went down the incline, and where it stopped, and where it crossed the sidewalk — gave the distance between the line of the street and the place of the accident as seventeen feet. The testimony of Stetson, who was the only witness on this point called by the plaintiff, was to about the same effect, although one or two of his answers might warrant a finding that the distance was not quite so great. The plaintiff contends that the open field with the earth dumped upon it, as described above, was so dangerous as to call for a railing to prevent persons driving on the street from being injured by driving over it.

It has often been held that a city or town is not bound to erect barriers to prevent travellers from straying from a highway, and thereby reaching a dangerous place at a considerable distance from it. In *Adams* v. *Natick*, 13 Allen, 429, 431, Mr. Justice Wells says: "Towns are not required to fence their roads with a view to prevent frightened animals from escaping out of the limits of the highway, even when the near location of a railroad may render such occurrences probable. Neither are they bound so to construct their roads that a horse, frightened by any cause, and rushing out of the track which is wrought for travel, will not expose himself nor the carriage and its occupants to injury from the embankments, gutters, or other obstructions upon the sides of the road, either within or without the limits of the highway. . . . They are bound to provide suitable railings against precipices, excavations, steep banks, deep water, etc., within or without the limits of the road, if they are so imminent to the line of public travel as to expose travellers to unusual hazard." The question in every such case is whether there is a dangerous place or object so near the line of travel that travellers will be likely to be injured by it unless a railing is provided for their protection. The risk of coming upon a dangerous object, and the degree of danger incurred if one does come upon it, are both involved in the question. It is ordinarily a question of fact for the jury; but if, in the view of the evidence most favorable to the plaintiff, the risk is so small that it would be unreasonable to require the city or town to provide the railing, the court will decide it as a question of law, and order a verdict for the defendant. It has frequently been decided that a dangerous

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place, to require a railing, must be of an unusual character, such as a bridge, declivity, excavation, or steep bank. It is difficult to lay down any general rule applicable to these cases, but in the present case it seems that the risk of an accident such as happened was very small. It would seem very improbable that one driving with ordinary care along the street would go over the sidewalk into the field, and go on over the soft earth a distance of seventeen feet to a steep declivity. If unwittingly he should find himself driving on the earth which had been dumped there, there would be little probability of any serious accident. We are of opinion that there was no evidence which would warrant the jury in finding the way to be defective. *Sparhawk* v. *Salem*, 1 Allen, 30. *Murphy* v. *Gloucester*, 105 Mass. 470. *Marshall* v. *Ipswich*, 110 Mass. 522, 526. *Puffer* v. *Orange*, 122 Mass. 389. *Barnes* v. *Chicopee*, 138 Mass. 67. *Damon* v. *Boston*, 149 Mass. 147, 151. *Hudson* v. *Marlborough*, 154 Mass. 218, 223. *Richardson* v. *Boston*, 156 Mass. 145. *Logan* v. *New Bedford*, 157 Mass. 534.

The bill of exceptions also states that the horse was beyond the control of the driver. It is difficult to discover any evidence on which the jury could find that this loss of control was only momentary. If it was something more than a momentary accidental loss of control, which ought not to be treated as an independent contributing cause of the injury, and was a permanent or long continuing condition, the plaintiff would be precluded from recovery, even if the way were defective. *Babson* v. *Rockport*, 101 Mass. 93. *Lyman* v. *Amherst*, 107 Mass. 339, 346. *Wright* v. *Templeton*, 132 Mass. 49, 51. *Higgins* v. *Boston*, 148 Mass. 484, 486. But this part of the case need not be further considered.

Exceptions overruled.

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JOSEPH H. CUTTER *vs.* OSCAR S. GILLETTE.

Suffolk. January 8, 1895. — February 27, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Breach of Contract — Evidence — Damages.

In an action for breach of a contract of hiring, the defendant has no ground of exception to the exclusion of evidence, upon the cross-examination of the plaintiff, offered to show that his personal reputation as to credit among dealers was so poor that he could not get credit to carry on the business in which he attempted to work after his wrongful discharge from the defendant's service.

In an action for breach of a contract of hiring, brought before the expiration of the contract period, the plaintiff is entitled to recover damages for the unexpired portion of such period subsequent to the time of trial.

CONTRACT, for breach of a written agreement entered into on April 25, 1892, by the terms of which the defendant, who had bought the plaintiff's business, agreed to employ him as foreman for the period of five years at a salary of twenty-four dollars a week. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

W. M. Noble, for the defendant.

F. S. Hesseltine, for the plaintiff.

BARKER, J. The evidence offered and excluded upon the cross-examination of the plaintiff was in effect that his personal reputation as to credit among dealers was so poor that he could not get credit to carry on the business in which he attempted to work after his wrongful discharge from the defendant's service. Assuming that the defendant was entitled to show that the plaintiff might have earned more money than he did between the time of his discharge and the time of trial; evidence of the plaintiff's poor reputation for credit among dealers did not tend to show that he could have succeeded in the business; and it was rightly excluded, as it might have had a tendency to prejudice the jury against the plaintiff. Its only other tendency would seem to be to enhance the plaintiff's damages, and we do not see how the defendant was harmed by its exclusion.

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The exception to the refusal to instruct the jury to the effect that, if the plaintiff after his discharge began to do business on his own account, he could not recover damages relating to the period of time after he so entered into business, was waived at the argument.

The remaining question is whether the jury should have been allowed to assess damages for the period of time subsequent to the trial. The plaintiff was hired for five years from April 25, 1892, and was discharged about the middle of July, 1892. He brought suit on November 10, 1892, and the verdict was rendered on March 15, 1894. The verdict assessed at the sum of $3,180.95 the plaintiff's whole damages for breach of the contract of hiring, and stated that of this amount $1,392.95 was the damage to the time of trial. The defendant concedes that the plaintiff is entitled to recover damages for an entire breach so far as such damages can be ascertained, but contends that, as the trial occurred before the expiration of the contract period, it was impossible for the jury to ascertain or assess the damage for the unexpired portion of the contract period subsequent to the time of trial. In support of this contention the defendant cites the cases of *Colburn* v. *Woodworth*, 31 Barb. 381, *Fowler* v. *Armour*, 24 Ala. 194, *Lichtenstein* v. *Brooks*, 75 Tex. 196, and *Gordon* v. *Brewster*, 7 Wis. 355, in which cases it seems to have been held that, if the suit is begun before the expiration of the contract period, damages can only be allowed to the time of the trial. He asserts that in the case of *Howard* v. *Daly*, 61 N. Y. 362, in which full damages were given, the writ was brought after the expiration of the contract period. On the other hand, it has been held in Vermont that, if there has been such a breach as to authorize the plaintiff to treat it as entirely putting an end to the contract, he may recover damages for an entire non-fulfilment, and is not limited to what he has actually sustained at the time of his bringing suit or the time of trial. *Remelee* v. *Hall*, 31 Vt. 582. And in Maine, in an action for breach of a contract of hiring brought before the expiration of the contract period, it was held that the just recompense for the actual injury sustained by the illegal discharge was the stipulated wages less whatever sum the plaintiff actually earned, or might have earned, by the use of reasonable diligence. *Sutherland* v. *Wyer*, 67 Maine, 64.

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Such would seem to be the rule in Pennsylvania. See *King* v. *Steiren*, 44 Penn. St. 99; *Chamberlin* v. *Morgan*, 68 Penn. St. 168. And the defendant concedes that such is the rule in England. We do not go into an exhaustive consideration of the decisions upon the question, as we consider it to have been settled in favor of the ruling given at the trial by our decisions. *Dennis* v. *Maxfield*, 10 Allen, 138. *Blair* v. *Laflin*, 127 Mass. 518, 522. *Jewett* v. *Brooks*, 134 Mass. 505. *Paige* v. *Barrett*, 151 Mass. 67. See also *Warner* v. *Bacon*, 8 Gray, 397, 408; *Amos* v. *Oakley*, 131 Mass. 413; *Parker* v. *Russell*, 133 Mass. 74; *Drummond* v. *Crane*, 159 Mass. 577, 581. The plaintiff's cause of action accrued when he was wrongfully discharged. His suit is not for wages, but for damages for the breach of his contract by the defendant. For this breach he can have but one action. In estimating his damages the jury have the right to consider the wages which he would have earned under the contract, the probability whether his life and that of the defendant would continue to the end of the contract period, whether the plaintiff's working ability would continue, and any other uncertainties growing out of the terms of the contract, as well as the likelihood that the plaintiff would be able to earn money in other work during the time. But it is not the law that damages which may be larger or smaller because of such uncertainties are not recoverable. The same kind of difficulty is encountered in the assessment of damages for personal injuries. All the elements which bear upon the matters involved in the prognostication are to be considered by the jury, and from the evidence in each case they are to form an opinion upon which all can agree, and to which, unless it is set aside by the court, the parties must submit. The liability to have the damages which he inflicts by breaking his contract so assessed is one which the defendant must be taken to have understood when he wrongfully discharged the plaintiff, and if he did not wish to be subjected to it he should have kept his agreement.

Exceptions overruled.

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COMMONWEALTH *vs.* MARJORY McCABE.

Middlesex. January 28, 1895. — February 27, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Intoxicating Liquors — Evidence — Prosecution of Defendant no Bar to a Use of the Testimony in another Case — Stopping Counsel in Argument — Instructions — Silence as an Admission — Failure to call Witnesses.

At the trial of a complaint for keeping and maintaining a liquor nuisance three police officers testified that on a certain day they visited the defendant's tenement, and in the kitchen found four men sitting with bottles of beer, out of which they had been drinking; that the defendant was there, and that they took the bottles and beer from the men, who objected, saying in the hearing of the defendant that they had bought and paid for the beer, and that the officers ought not to take it. *Held*, that, if the statement was to be believed, it fairly, although not necessarily, implied that the men bought the beer there, and not that they bought it elsewhere and carried it to the defendant's kitchen to drink it.

The prosecution of a person for keeping intoxicating liquor with intent to sell it unlawfully is no bar to a use of the testimony in the case to prove him guilty of keeping and maintaining a common nuisance.

At the trial of a complaint for keeping and maintaining a liquor nuisance three police officers testified to finding four men in the defendant's kitchen, and in his presence, drinking liquor, which they took from the men under their protest that the liquor was theirs and that they had paid for it. The counsel for the defendant interrupted the district attorney in his argument that the evidence was true from the failure of the defendant to call the men as witnesses, and that it would not be safe for the government to summon them, as they were friends of the defendant and would favor him, on the ground that, until it appeared that the men were under the control of the defendant or could be produced by him, and that they knew about the case, no inference could be drawn against him, and that the government was as much under obligation to produce the men as the defendant. The judge declined to stop the district attorney in his argument. *Held*, that the defendant had no ground of exception.

At the trial of a criminal case the judge instructed the jury that, if a statement was made in the hearing and presence of a person which affected his rights or was criminating to him and he remained silent, such silence was tantamount to an admission of the truth of the facts stated, provided the same was heard and understood by such person, and he was not in custody or under restraint, but at liberty to reply or explain, and provided such statement was of such a nature, and made under such circumstances and by such persons, as naturally to call for a reply. *Held*, that if, instead of saying that silence was "tantamount" to an admission, the judge had said that it was in the nature of an admission, the instructions would have been strictly accurate, but that the inaccuracy, if any, was eliminated by the jury being told that if they found the facts as contended by the government "they would give to the circumstance such weight and significance as they thought it entitled to."

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At the trial of a criminal case the judge instructed the jury that, if there was evidence to rebut that of the government which might be furnished by witnesses other than the defendant, and if the evidence against the defendant was such that he would be expected to call them, his failure so to do would be a circumstance to be considered and given such weight and significance by the jury as they thought it entitled to, and from which they might infer, if they thought the inference warranted and a reasonable one, that such witnesses would testify unfavorably to the defendant; but that unless it appeared that such witnesses were within the defendant's control, and could be procured by him, the jury were to give no significance to his failure to call them. The judge declined the defendant's request to give the further instruction that, if it did not appear that the witnesses were under the defendant's control, the government was under the same obligation to produce the witnesses as the defendant, and that their non-production by the government was to be considered as much against it as against the defendant. *Held*, that the defendant had no ground of exception, especially as there were circumstances from which the jury might well have inferred that the witnesses were under the defendant's control and could be procured by him.

COMPLAINT, for keeping and maintaining a liquor nuisance between April 1 and December 27, 1893, in Somerville. At the trial in the Superior Court, before *Lilley*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, in substance as follows.

The only witnesses were three police officers, two of whom testified that on April 29, 1893, they visited the tenement occupied by the defendant, and in the kitchen found four men sitting with bottles of lager beer, out of which they had been drinking; that the defendant was also in the room; that the officers took the bottles and beer away from the men, who objected, saying to the officers, in the hearing of the defendant, that they had bought and paid for the beer, and it was theirs, and the officers ought not to take it. This testimony was admitted, subject to the defendant's exception. The officers also testified to finding a large quantity of intoxicating liquors on the premises, and because of the liquors found on that date the defendant was complained of in the district court at Somerville for keeping liquors with intent to sell, and on that charge the witnesses testified, with reference to what took place on April 29, 1893, the same as in the present case, and that case for keeping and maintaining with intent to sell was then pending in the Superior Criminal Court of Middlesex.

Two officers testified that on December 27, 1893, they visited the premises aforementioned, and there found in the room nine

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quart bottles of whiskey, covered over, which they seized. One of the officers testified to seeing eight or ten men, at different times, going into and out of the premises, and that the premises were occupied by three tenants, of whom the defendant was one, her part of the building, however, being separated from that occupied by the other tenants.

The defendant herself did not testify, nor offer any evidence, and the government offered no other evidence.

The defendant asked the judge to rule that all the testimony of the officers which applied to April 29, 1893, because it was the subject of another complaint, then pending, should not be considered by the jury as a part of this case. The judge declined so to rule; and the defendant excepted.

The counsel for the government, in arguing the case, urged that the evidence of the officers was true, and that if it was not, the defendant, so far as appeared, could have summoned the four men found on her premises to show that it was not true.

The counsel for the defendant, interrupting the district attorney, objected to this argument, and claimed that until it appeared that the four men referred to were under the control of the defendant, or were so that she could produce them, and that they knew about the case, no such inferences could be drawn against her; and that the government upon the evidence was as much under obligation to produce such witnesses as the defendant. The judge declined to stop the district attorney in his argument; and the defendant excepted.

The counsel for the government also argued to the jury that, if the government was under any obligation to produce such witnesses, he would explain it by saying that, as they were friends of the defendant, it would not be safe for the government to summon them, as they would favor the defendant and not the government, to which the defendant objected, and the judge did not stop counsel for the government in his argument in that line; and the defendant excepted.

The counsel for the government further argued to the jury, that on the occasion of April 29, 1893, when the officers went to the premises of the defendant and there found the four men with lager beer, her silence at the time the men said they bought the liquor, and it was theirs, was an admission of the truth of

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the statement made by these men that the liquor was theirs, and that they bought it, and she sold it to them.

On this part of the case the presiding judge called the attention of the jury to the evidence relative to the silence of the defendant when the men claimed the beer as theirs and said they had bought and paid for it, and instructed the jury that the rule as applied to that part of the case was, that if a statement was made in the hearing and presence of a person which affected his rights or was criminating to him, and he did not reply to it nor make any explanation, but remained silent, such silence was tantamount to an admission of the truth of the facts contained in the statement made, provided the same was heard and understood by such person, and he was not in custody nor under restraint, but at liberty to reply or explain, and provided such statement was of such a nature, and made under such circumstances and by such persons, as naturally to call for a reply. And the court instructed the jury that, applying the rule thus given to the case, if they found that the remark was made by the men, and that the defendant remained silent as testified by the officers, they were to give to the circumstance such weight and significance as they thought it entitled to. To this instruction the defendant excepted.

The judge also ruled as to the production of witnesses who knew about the facts in issue, that if there was evidence to rebut the evidence of the government which might be furnished by witnesses other than the defendant, and if the evidence against the defendant was such that she would naturally be expected to call them, her failure so to do would be a circumstance which might be considered by the jury, and given such weight and significance as they thought it entitled to, and from which they might infer, if they thought the inference warranted and a reasonable one, that such witnesses would testify unfavorably to the defendant; but that unless it appeared that such witnesses were within the defendant's control, and could be procured by her, the jury were to give no significance whatever to her failure to call them. The defendant excepted, and asked the judge to rule upon the evidence, that, if it did not appear that the witnesses were under the control of the defendant, the government was under the same obligation to produce the four men referred to

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as was the defendant, and that the non-production of the witnesses by the government was to be considered as much against the government as against the defendant. The judge declined to add to the instructions; and the defendant excepted.

T. J. Gargan & P. J. Casey, for the defendant.

F. N. Wier, District Attorney, for the Commonwealth.

KNOWLTON, J. 1. The evidence of what occurred and what was said in the defendant's kitchen in her presence was rightly admitted. The jury might well believe that the statement of the four men who were sitting in the kitchen drinking lager beer from bottles should be understood as meaning that they bought the beer of the defendant. The statement should be considered in connection with all the circumstances and with facts of common knowledge, so far as those facts and circumstances tend to throw light on the questions at issue. If the statement is to be believed, it fairly, although not necessarily, implies that they bought the beer there, and not that they bought it elsewhere and carried it to the defendant's kitchen to drink it. *Commonwealth* v. *Brailey*, 134 Mass. 527. *Commonwealth* v. *Funai*, 146 Mass. 570.

2. The prosecution of the defendant for keeping this liquor with intent to sell it unlawfully is no bar to a use of the testimony to prove her guilty of keeping and maintaining a common nuisance. *Commonwealth* v. *Hazeltine*, 108 Mass. 479. *Commonwealth* v. *McShane*, 110 Mass. 502.

3. It was not the duty of the presiding justice to stop the district attorney in his argument from the failure of the defendant to call the witnesses who were in her house at the time referred to. The jury might well believe, from their being found in the kitchen of her dwelling-house, that her relations to them were such that she would be likely to know their whereabouts, and that if their testimony could help her she would be able to procure their presence. They might also believe that their relations to her were such that the Commonwealth would not be expected to make an effort to procure their attendance when it had other evidence on which it relied to prove its case.

4. The instruction of the presiding justice in regard to the silence of the defendant when the men claimed the beer as theirs, and said they had bought it and paid for it, was substantially

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correct, and the defendant cannot justly complain of it. If, instead of saying that silence in the hypothetical case stated in giving the rule was "tantamount" to an admission, he had said that it was in the nature of an admission, the charge would have been strictly accurate. The difference in meaning between the two expressions is very slight, and if there was an inaccuracy in this particular it was eliminated from the case when the jury were told that, if they found the facts as contended by the Commonwealth, "they would give to the circumstance such weight and significance as they thought it entitled to."

5. The instructions in regard to the failure of the defendant to call witnesses in her favor were correct. There were circumstances from which the jury might well have inferred that the witnesses were within the defendant's control and could be procured by her. *Commonwealth* v. *Finnerty*, 148 Mass. 162. *Commonwealth* v. *Clark*, 14 Gray, 367. *Exceptions overruled.*

COMMONWEALTH *vs.* GEORGE F. GREEN.

Suffolk. January 28, 1895. — February 27, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Intoxicating Liquors — Guilty Knowledge — Sale by Servant.

Guilty knowledge that one is acting in violation of law is not essential to the offence of selling intoxicating liquors, and a servant is responsible if he has made a sale, however innocently, which the law forbids him to make.

COMPLAINT, for unlawfully selling intoxicating liquors. At the trial in the Superior Court, before *Bishop*, J., it appeared in evidence that at the time of the alleged offence the defendant was a hotel waiter in the employment of two persons duly licensed by the board of police commissioners of the city of Boston as innholders, and to sell liquors of any kind as such innholders to be drunk in the inn or hotel described in their license; that while acting in their employment in said inn or hotel on October 14, 1894, which was the Lord's day, two men entered

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from the common room of the hotel, in which was the hotel clerk's office, into a small dining-room where the defendant was in attendance, and called for two bottles of lager beer; and that one of them, the complainant, paid him for the beer, and the defendant then delivered it to them.

The defendant testified that he believed the men were both guests of the hotel at the time, resorting to it for food and lodging, and that he served them with the beer delivered in that belief, as the hotel clerk had directed his attention to them, and that he had no reason to think they were not guests.

The defendant's counsel asked the following instructions:

"If the jury find that the defendant sold and delivered the liquor to the person alleged, believing he was a guest of the inn or hotel in question who had resorted to the inn or house for food or lodging, the defendant is entitled to a verdict.

"To render a verdict against the defendant, the jury must find that the defendant did not deliver the liquor alleged in the belief that the person to whom it was delivered was a guest of the inn in question."

The judge declined so to rule.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. F. Donnelly, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

BARKER, J. It is perfectly well settled that "guilty knowledge that one is acting in violation of law is not essential to the offence of unlawfully selling intoxicating liquors." *Commonwealth* v. *Uhrig*, 138 Mass. 492, 493. *Commonwealth* v. *Julius*, 143 Mass. 132, 134. And in *Commonwealth* v. *Stevens*, 153 Mass. 421, 425, the logical deduction was stated, in dealing with the case of a master's liability for an unwitting violation of the law by a servant, that "the servant himself is no doubt responsible, because he has made a sale, however innocently, which the law forbade him to make."

Exceptions overruled.

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JOHN DRISCOLL *vs.* CITY OF FALL RIVER.

Bristol. October 22, 1894. — February 28, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Employers' Liability Act — Evidence of Reputation — Sufficiency of Notice.

In an action for personal injuries, evidence of a general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that, if the master had exercised due care, he might have learned or heard of the incompetency; but the reputation of a foreman amongst a few workmen employed under him is inadmissible, as it is merely the opinion of a small number of men, of which there is no reason to suppose that the master may be cognizant, or which he may be bound to heed.

While the notices required in an action for personal injuries under St. 1887, c. 270, § 3, and amendments thereto, are not to be construed with technical strictness, enough should appear in them to show that they are intended as the basis of a claim against the defendant, and were given in behalf of the person who brings the suit.

TORT, for personal injuries occasioned to the plaintiff on June 1, 1893, while in the employ of the defendant. The first count of the declaration, which was at common law, alleged that the injury was caused by reason of the incompetency of a foreman employed by the defendant; the second count, which was under the employers' liability act, St. 1887, c. 270, and acts amendatory thereof, alleged that due notice of the time, place, and cause of the injury was given to the defendant.

At the trial in the Superior Court, before *Aldrich*, J., upon the issue of the competency of the foreman, a witness called by the plaintiff testified that he had been employed by the defendant off and on for a good many years; that he had worked steadily for the city for two seasons before the accident; that he had known of this foreman for a year or two without being acquainted with him, and was working under him at the time of the accident; that he never associated with him except while he was with the men at the work in question; that he had been at work before this accident three or four days, or that week, — he could not say; and that he had no knowledge of the foreman's reputation in the city of Fall River among people generally,

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any more than that he had been working in the city since the witness was in it, and that his work the witness did not know anything about.

The judge ruled that the witness was incompetent to testify as to the foreman's reputation, to which ruling no exception was taken. The plaintiff then asked the witness, "Do you know the reputation he had among the men who worked under him?" The judge said, "That cannot be a general reputation, because a gang of half a dozen men say something about their foreman; that is not a general reputation." The plaintiff's counsel then asked the witness, "What was the reputation which Mr. Terry [the foreman] had among the men who worked under him?" The question was objected to by the defendant, and the judge said, "He need not answer that question; he has already said he did not know what his [Terry's] general reputation was." The plaintiff excepted.

Other witnesses to Terry's reputation called by the plaintiff were held upon their answers to be competent, and allowed to testify on that subject.

The plaintiff offered in evidence, as notice of the time, place, and cause of the injury, two papers, pinned together and written in behalf of the plaintiff by his physician, Dr. N. B. Aldrich. These two papers were as follows:

1. "John Driscoll.—Worked Monday; Tuesday was Memorial day; worked Wednesday; worked Thursday morning; was hurt Thursday afternoon at about half-past one o'clock. Working on the Brownell Street sewer, near the Highland Road. A gang of six men moved the derrick. Boss Terry was there when the derrick was placed. I was after throwing a shovel of dirt up. No one said anything to me. The derrick fell, and I was crushed against the side of the bank. They took me out, and I sat down. The boss said, 'Stay there and rest yourself.' The tool boy came with the picks, and the boss told him to give me a ride. He left me at the dispensary. Robert Hargraves telephoned for Dr. Kelley."

2. "Fall River, Mass., June 29, 1893. — In my opinion John Driscoll is severely hurt. I am of the opinion that the result of the accident may render him unfit for manual labor during a long period; that it will be a matter of months before he is able

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to follow his employment; that it may be a matter of years; that possibly he may never be able to do another day's work. He is suffering from the results of the accident, viz.: three fractured ribs; a dislocation of the breast-bone end of the left collar bone; a partial riding of the other collar bone at the breast-bone end; a backward displacement of the (ensiform) cartilage at the end of the breast bone, which cartilage, due to its position, interferes with respiration or any abdominal movements. He is suffering from some obscure injuries to the abdominal organs, the exact nature of which is not plain; also from concussion and bruises. Dr. N. B. Aldrich."

The judge ruled that these papers did not constitute a sufficient notice under the statute; and the plaintiff excepted.

The case was submitted to the jury on the common law count upon instructions not objected to, and the jury returned a verdict for the defendant. The plaintiff alleged exceptions.

E. J. Rich, for the plaintiff.

G. Grime, for the defendant.

MORTON, J. It is evident that the question which was objected to called for an answer as to the reputation of the foreman amongst the gang with which the witness had been working from three or four days to a week, and whose number did not appear, nor how long they had worked under the foreman. A general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that, if the master had exercised due care, he might have learned or heard of the incompetency. But the reputation of a foreman amongst a few workmen employed under him is not a general reputation. It is merely the opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to heed. *Monahan* v. *Worcester*, 150 Mass. 439. *Gilman* v. *Eastern Railroad*, 13 Allen, 433, 444. *Whitcher* v. *Shattuck*, 3 Allen, 319, 321.

We assume that the two papers which are relied on as being the notice were given to the defendant, though the bill of exceptions does not state that they were, nor where nor to what officer; but we do not think that they constituted a sufficient notice. The first paper is headed "John Driscoll," and appears

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to be a record of the events immediately preceding and connected with the accident to him. The second paper is a description over the signature of a physician of the injuries sustained by John Driscoll as the result of the accident. We may conjecture that the two papers were intended to be a notice to the defendant of the time, place, and cause of the injury, in accordance with the statute. But they neither purport to be given in behalf of the plaintiff, nor to indicate that he had any claim against the city. The notices required by the statute are not to be construed with technical strictness, but enough should appear in them to show that they are intended as the basis of a claim against the city or town, and are given on behalf of the person who brings the suit. *Kenady* v. *Lawrence*, 128 Mass. 318. St. 1887, c. 270, § 3, and amendments.

We think that the notice in this case is defective in both particulars. *Exceptions overruled.*

BRIDGET L. WHITE *vs.* PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Essex. November 8, 1894. — February 28, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Life Insurance — Warranty in Application for Policy — "Misrepresentation" — Statute — "Attended" by Physician.

An application for a policy of life insurance stated that it was "declared and warranted that all the statements and representations contained in" the same were "material" and "true," and, "with the stipulated premiums," should "be the sole basis of the contract . . . if a policy be issued . . . thereon, and that if any concealment, or fraudulent or untrue statement or representation be made," the policy should be void. The application contained certain questions and answers, at the end of which, and above the applicant's signature, was the following: "I hereby warrant said answers to be true." The policy recited that, "in consideration of the stipulations and agreements in the application herefor and upon the next page of this policy, all of which are a part of this contract," and in consideration of the payment of the premium thereon, the company promised to pay to the beneficiary a certain sum upon satisfactory proofs of the death of the assured. *Held*, in an action upon the policy, that St. 1887, c. 214, § 21, relating

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to the effect of a "misrepresentation" made in the negotiation of a policy of insurance, applied to the policy in suit.

If a person goes to the office of a physician and tells him that he has coughed and spit blood, and desires him to make a physical examination, to which he submits, receiving a prescription and paying for the physician's services, and subsequently calls again at the latter's office, consulting him professionally and paying him a fee, such person is "attended" by a physician, within the meaning of the question in an application for a policy of life insurance, "When and by what physician were you last attended, and for what complaint?"

CONTRACT, upon a policy of insurance for $2,000, issued by the defendant on September 28, 1891, on the life of John T. White, and payable to the plaintiff, who was his mother. Trial in the Superior Court, before *Sherman*, J., who reported the case for the determination of this court, in substance as follows.

John T. White died on February 26, 1892. The application for insurance was signed by the assured on September 28, 1891, and contained the following statements: "I hereby apply to the" defendant "for a policy of insurance to be issued in accordance with the directions hereof. It is hereby jointly agreed by myself and all parties in interest, or who shall become interested, as follows: . . . It is hereby further declared and warranted that all the statements and representations contained in Part 1 and Part 2 of this application, . . . by whomsoever they be written, are material and are true, and, with the stipulated premiums, shall be the sole basis of the contract with the" defendant, "if a policy be issued or renewed thereon, and that if any concealment, or fraudulent or untrue statement or representation be made, or if at any time any covenant or agreement herein made shall be violated, said policy and insurance shall be null and void."

In Part 2 of the application were the following printed questions and answers, written by the person who acted as medical examiner:

"2. Are you now in good health? Yes."

"5. Have you ever had habitual cough, raising or coughing of blood, difficult or short breathing, habitual expectoration, pain in chest, or any pulmonary symptom? No."

"12. Disease of lungs? No."

"15. Have you now, or have you ever had, any of the following? Answer yes or no as to each. If 'Yes' in any case, give particulars under 18 below."

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"17. Have any of your blood relatives ever committed or attempted suicide, or been afflicted with or died of consumption, insanity, cancer, or any hereditary disease? (Answer fully.) No."

"20. When and by what physician were you last attended, and for what complaint? (Answer fully and specifically.) Not since childhood."

At the end of the application, and just above the applicant's signature thereon, was the following clause: "I hereby further declare that I have read and understand all the above questions put to me by the medical examiner, and the answers thereto, and I hereby warrant said answers to be true."

Upon the same piece of paper on which the policy was printed a copy of the application, having the answers and signatures thereon, was printed and written. The policy provided that the defendant, "in consideration of the stipulations and agreements in the application herefor and upon the next page of this policy, all of which are a part of this contract," and in consideration of the payment of the premium thereon, promised to pay to the plaintiff the sum of $2,000 upon satisfactory proofs of the death of the assured.

The defendant introduced evidence tending to show that the answers to the questions in the application above stated were not true; and there was evidence introduced by the plaintiff that the answers were true.

The only respect in which the defendant contended that the answer to the question, "Are you now in good health?" was untrue, was that the plaintiff then had disease of the lungs; and the evidence upon this point related only to that disease. The evidence as to the untruth of the answer to question 17 related to the death of a brother of the assured.

The defendant's contention that the answer to question 20 was untrue was based solely upon the evidence of a physician, who testified, in substance, that some time between March and September, 1888, the assured came to his office and told him he had coughed and spit some blood, and desired him to make an examination; that he did so by questioning the assured, and by an examination of his chest by percussion and with a stethoscope; that, in his opinion, the insured had incipient

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phthisis, but that he did not inform the assured of his opinion; that he prescribed some medicine for the cough, and a tonic; that the assured called again in a week's time, and the cough appeared much improved; and that the assured paid for these services.

The judge instructed the jury upon this point as follows: "If John T. White went to Dr. Sanborn's office, told him that he had coughed and spit blood, and desired Dr. Sanborn to make an examination, and submitted to a physical examination aided by the use of the stethoscope, received a prescription, and paid Dr. Sanborn for his services, and subsequently called at Dr. Sanborn's office, consulted him professionally, and paid him a fee, then John T. White was attended by a physician within the meaning of question 20"; and the plaintiff excepted.

The plaintiff requested the judge to rule that the answers to the questions in the application were representations, and not warranties; but he declined so to rule, and instructed the jury that they were warranties.

The plaintiff also requested the judge to rule that St. 1887, c. 214, § 21, applied to the case; but he declined so to rule.

The plaintiff excepted to the above ruling and refusal to rule; and the jury returned a verdict for the defendant. Such order was to be made as justice might require.

The case was argued at the bar in November, 1894, and afterwards was submitted on the briefs to all the judges.

J. F. Quinn, (*H. P. Moulton* with him,) for the plaintiff.

W. H. Moody, (*J. H. Pearl* with him,) for the defendant.

BARKER, J. The most important question raised by the report is as to the effect of St. 1887, c. 214, § 21, now by the Massachusetts insurance act of 1894 re-enacted as St. 1894, c. 522, § 21. The question is, in substance, whether the provisions of that section include in the word "misrepresentation" statements which in insurance law are classed as warranties because expressly said to be warranties by the language of the parties, or whether the section deals only with statements which are representations, and not with technical warranties. The ruling given was upon the theory that the section did not affect statements which were said in the policy and the application to be warranties, but only misrepresentations as to

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matters which were the subject of representations, as distinguished from warranties.

The section as it stood in St. 1887, c. 214, § 21, was in these words: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss"; and the language of St. 1894, c. 522, § 21, is the same. This language is broader than that of Pub. Sts. c. 119, § 181, which applied only to misrepresentations made in obtaining or securing policies of fire insurance and of life insurance, and which was in these words: "No oral or written misrepresentation made in obtaining or securing a policy of fire or life insurance shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increases the risk of loss."

The broader language of the section, as it is found in the general insurance act of 1887, was clearly designed to extend the rule, which up to that time dealt only with misrepresentations affecting policies of fire insurance and of life insurance, and to apply it to misrepresentations made in the negotiation of any contract or policy of insurance of whatever kind. Section 181 of Pub. Sts. c. 119, is merely a re-enactment identical in language with St. 1878, c. 157, § 1, which as to life insurance was a wholly new provision. There was, however, a previously enacted statute concerning the form of fire insurance policies, providing that the conditions of the insurance should be stated in the body of the policy, and that neither the application of the insured nor the by-laws of the company should be considered as a warranty or a part of the contract except so far as incorporated in full into the policy and appearing on its face before the signatures of the officers of the company. This was St. 1864, c. 196, which took the place of and repealed St. 1861, c. 152, which seems to have been the earliest statute dealing with the form of fire insurance policies, and which provided that in all insurance against loss by fire the conditions of the insurance should be stated in the body of the policy, and that neither the application nor the

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by-laws, as such, should be considered as a warranty, or part of the contract. The provisions of Pub. Sts. c. 119, § 181, were substantially re-enacted in the general insurance act of 1887, and in that of 1894. See St. 1887, c. 214, § 59; St. 1894, c. 522, § 59. Besides the statutes already noted there are also the several enactments, beginning in the year 1873, establishing a standard form for policies of fire insurance. These are St. 1873, c. 331, with the amendatory act St. 1880, c. 175; St. 1881, c. 166, repealing the two acts last cited and prescribing a new standard form of policy; and Pub. Sts. c. 119, § 139, St. 1887, c. 214, § 60, and St. 1894, c. 522, § 60, the last three being substantially re-enactments continuing in force the provisions of St. 1881, c. 166. In the standard form of policy given in St. 1873, c. 331, § 1, is this clause: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured," and the same clause is in the standard form given in St. 1881, c. 166, § 1, and in Pub. Sts. c. 119, § 139, in St. 1887, c. 214, § 60, and in St. 1894, c. 522, § 60.

The provisions of St. 1887, c. 214, § 21, are thus seen to be part of a system of legislation, beginning in the year 1861, and then applied only to fire insurance, in which the Legislature has dealt with the subject of statements on the part of the assured affecting contracts of insurance, and which, before the question now raised for decision arose, had been made to apply to all statements made in the negotiation of contracts and policies of insurance of whatever kind.

The St. 1878, c. 157, does not appear to have been enacted in consequence of any recommendation by the insurance department, nor has any construction been given to that statute, or to Pub. Sts. c. 119, § 181, St. 1887, c. 214, § 21, or St. 1894, c. 522, § 21, by that department, or by this court, except so far as the St. 1887, c. 214, § 21, has been dealt with in the case of *Ring* v. *Phœnix Assurance Co.* 145 Mass. 426, and that of *Durkee* v. *India Ins. Co.* 159 Mass. 514. The case last cited has no bearing upon the present question, nor is that question governed by the decision in *Ring* v. *Phœnix Assurance Co.*

The statutes above referred to show a general intention on the part of the Legislature to make, in lieu of the rules which spring from the doctrines held in the law of insurance as to technical

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warranties and representations, a statute rule by which to determine the effect upon the contract of all statements on the part of the assured, and also the effect of by-laws and similar matters which it might otherwise be contended would avoid or modify the contract.

The distinction in insurance law between warranties and representations is said by Baron Parke, in *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, 496, to have been laid down by Lord Mansfield. In *Pawson* v. *Watson*, Cowp. 785, 787, decided in the year 1778, Lord Mansfield said: "There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a warranty or condition which makes part of a written policy and a representation of the state of the case. Where it is a part of the written policy, it must be performed. . . . Nothing tantamount will do, or answer the purpose. It must be strictly performed, as being part of the agreement. . . . So that there cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy and a collateral representation, which, if false in a point of materiality, makes the policy void; but if not material, it can hardly ever be fraudulent."

And in *De Hahn* v. *Hartley*, 1 T. R. 343, decided in 1786, he said: "There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered; but a warranty must be strictly complied with. . . . A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with." And in the same case Ashhurst, J. says, "The very meaning of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so."

These doctrines of the law of insurance have long been recognized in our decisions, and their effect was fully pointed out by this court before the enactment of St. 1878, c. 157. See *Houghton* v. *Manufacturers' Ins. Co.* 8 Met. 114, 120; *Campbell* v. *New England Ins. Co.* 98 Mass. 381, 389, 401.

It is easy to see how an insurer, by multiplying immaterial

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statements to be made by the insured, and giving to them by the wording of the policy the technical character of warranties, can, in the absence of any statute provision upon the subject, place the assured in a position in which it will be difficult, if not impossible, for him, although he has acted in good faith, to recover upon his contract because of some inaccurate statement on his part. If he is held to have warranted the truth of a statement, its exact and literal truth is a necessary condition of his right to recover, however immaterial the statement may be, and however honest may have been his conduct. In the opinion of a majority of the court it was the intention of the Legislature, by St. 1878, c. 157, to change this rule to some extent, and to enact in place of it one which should hold the contract valid unless the misstatement, if made in the negotiation of the contract, was made with an actual intent to deceive, or unless the misstatement was of a matter which actually increased the risk of loss; and this with reference to statements which may be said by the parties to be warranties, as well as those which were only representations. Such was already the law as to statements not technical warranties. As to mere representations the statute may well be held to be only declaratory, but as to warranties it made a new rule. In the opinion of a majority of the court, it speaks in terms neither of warranties nor of representations technically so called, but deals with all misrepresentations made in negotiating the contract or policy. Misstatements of fact, whether the statement is said to be by the parties a warranty or a representation, are equally misrepresentations, and are placed in each case upon the same footing by the statute which applies to them if the statements are called warranties by the parties no less than if they are mere representations. And the same construction must, in the opinion of a majority of the court, be given to Pub. Sts. c. 119, § 181, and to St. 1887, c. 214, § 21, which was in force when the policy sued on was written.

It is not necessary at present to consider whether the statute would have any effect if an immaterial statement, declared by the application to be a warranty, instead of, as in the present case, being referred to in the policy, and thus brought into it by such reference only, were independently written out at length in the policy itself, and thus there declared to be a warranty upon

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the exact truth of which the policy was conditioned and founded. The statements upon the falsity of which the defendant relies in this case are not incorporated into the policy except by reference to the application. The declaration of the applicant warranting the answers to be true was in his application made in the negotiation of his policy, and was within the operation of the statute. In the opinion of a majority of the court it was not taken out of the operation of the statute by the reference to the application in the policy, but it was "in consideration of the stipulations and agreements in the application herefor and upon the next page of this policy, all of which are a part of this contract."

In the trial of the present case a different view of the effect of the statute was held by the presiding judge, who ruled that because the statements of the assured were warranties the provisions of St. 1887, c. 214, § 21, did not apply. The plaintiff's exception to this ruling was well taken, and because the ruling was wrong the verdict for the defendant must be set aside and a new trial ordered.

We all agree that the ruling was correct that the assured was attended by a physician within the meaning of the question, "When and by what physician were you last attended, and for what complaint?" if he went to the office of a physician, told him that he had coughed and spit blood, desired him to make a physical examination, to which he submitted, receiving a prescription and paying for the services of the physician, and subsequently calling again at the physician's office and consulting him professionally and paying him a fee. The circumstances recited show that the assured was under the care and treatment of the physician for a complaint, and was as really attended by the physician as if the latter had seen the assured at his home.

Verdict set aside and new trial ordered.

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NELLIE LEVIE *vs.* METROPOLITAN LIFE INSURANCE COMPANY.

Hampden. September 25, 1894. — February 28, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Life Insurance — Misrepresentation in Application for Policy — Law and Fact — Exceptions.

In an action upon a policy of life insurance, the application for which contains an agreement that its answers and statements shall be part of the contract of insurance, and that any false, incorrect, or untrue answer shall render the policy void, whether answers and statements in the application were misrepresentations, and, if so, whether, under St. 1887, c. 214, § 21, they were "made with actual intent to deceive," or "the matter misrepresented increased the risk of loss," are questions of fact for the jury.

CONTRACT, upon a policy of insurance for $1,000, issued by the defendant upon the life of John McGearey, and payable to the plaintiff, who was his sister. At the trial in the Superior Court, before *Fessenden*, J., the defendant asked the judge to rule that, upon the whole evidence, the plaintiff could not recover, and to direct a verdict for the defendant; but the judge refused so to do.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts sufficiently appear in the opinion.

The case was argued at the bar in September, 1894, and afterwards was submitted on the briefs to all the judges.

E. H. Lathrop, for the defendant.

J. B. Carroll, for the plaintiff.

BARKER, J. The written application for insurance upon which the policy issued was made on June 6, 1892, and the assured died of acute consumption on January 12, 1893. The application contained an agreement that its answers and statements should be part of the contract of insurance, and that any false, incorrect, or untrue answer should render the policy void. Assuming that this language gave to each statement of the application the technical character of a warranty, nevertheless our

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statute provision that "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the assured, or in his behalf, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss," precludes the defendant from prevailing, unless it is established, not only that the statements or answers were incorrect, but also either that the misrepresentations were made with actual intent to deceive, or that the matter misrepresented increased the risk of loss. St. 1887, c. 214, § 21. See also St. 1878, c. 157, § 1; Pub. Sts. c. 119, § 181; St. 1894, c. 522, § 21; *White* v. *Provident Savings Assurance Society*, *ante*, 108; *Ring* v. *Phœnix Assurance Co.* 145 Mass. 426; *Durkee* v. *India Ins. Co.* 159 Mass. 514.

Whether the statements and answers of the application were incorrect, and whether, if they were incorrect, the misrepresentations were made with actual intent to deceive, or, if not so made, whether the matter misrepresented increased the risk of loss, were all questions of fact, to be submitted, if there was a conflict of evidence, to the jury with proper instructions. The only exception stated in the bill is to the refusal of the court to rule that, upon all the evidence, the plaintiff was not entitled to recover, and to direct a verdict for the defendant. We might overrule the exceptions upon the ground that the bill does not present or purport to present to us either all the evidence or the substance of the evidence. But assuming in favor of the defendant that the substance of the evidence is stated, in our opinion the ruling asked could not have been properly given.

We construe the question, "Are you ruptured, and if so, do you wear a well-fitting truss?" to relate to the time of the answer; and, conceding that upon the evidence the only reasonable finding was that the assured had suffered from a strangulated hernia in the year 1891, there was evidence tending to show that he had recovered from it before the time of the application. It is not a matter of law that a person who has once had hernia is thenceforward "ruptured." Whether the negative answer to this question was correct or incorrect was therefore a question of fact, and the jury may have found that the answer was correct.

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The questions growing out of the evidence that, at some time before making the application for insurance, the assured had been ruptured, and had suffered from strangulated hernia, which was reduced only after the calling of two physicians and the application of ether, are the only questions argued by the defendant. We assume that this experience of the assured was an illness which truth required him to disclose, in place of giving a negative answer to the question, "Give full particulars of any illness you may have had since childhood, and name of medical attendant or attendants," and that his answer was a misrepresentation which but for the statute cited would have avoided the policy. But we cannot say from the bill of exceptions that there was evidence which required the jury to find that the misrepresentation was made with actual intent to deceive, or that such an illness followed by a recovery increased the risk of loss. Very probably it might make the life of the assured less readily insurable, but whether it did so was a question of fact.

We also assume that by a fair construction the assured must be taken to have stated that the services of his usual medical attendant, whose name he gave, had been required only for the "grippe," and that he had consulted no other physician, and that, in view of the fact that both his usual medical attendant and another physician had operated upon him to reduce the hernia spoken of, both of these statements were misrepresentations.

But the two facts made essential by the statute to avoid the policy were still to be found by the jury as to these misrepresentations also, and the evidence stated in the bill of exceptions did not require a finding upon them for the defendant. Upon the evidence, all the misrepresentations might have been found to be made without actual intent to deceive, and it might also have been found that the matters misrepresented did not increase the risk of loss. There was a motion to set aside the verdict as against the evidence and the weight of the evidence, but upon this bill of exceptions we cannot review the order of the justice before whom the trial was had, denying the motion.

Exceptions overruled.

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MOSES HOLBROOK *vs.* FRANK G. NESBITT & another.

Suffolk. December 4, 1894. — February 28, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Equity — Trade Name — Injunction — Breach of Agreement — Multifariousness.

The plaintiff in a suit in equity against A. and B. was formerly in partnership with A., carrying on a law and collection business under the name of "F. & C.," each owning a one-half interest in the firm. This business had been carried on under that name for twenty years, and for the last twelve years by the plaintiff and A. The plaintiff conveyed to A. his one-half interest "in the business of law and collections of the firm of F. & C.," except as stated in an instrument of even date signed by the two, reserving to himself "the name 'F. & C.,' excepting as agreed in said" instrument. In that instrument A. conveyed to the plaintiff "all his right and interest in the name F. & C., with all the printed stationery and envelopes now on hand printed in that name"; and reserved "the right only to advertise he was lately of said firm, and to indorse checks in that name for collection or deposit only that pertain to business now in the hands of F. & C. or their correspondents, and to collect bills now due said firm"; and agreed to vacate the office occupied by the firm by a day named, and assign his interest in the lease to the plaintiff, who assumed the rent on the lease. The instrument further provided that all cases pending in court should remain in the plaintiff's charge, "subject to the right of the clients." Immediately after this agreement was signed, A. took an office in the same building in which the business of F. & C. had been carried on, and entered into partnership with B., an attorney at law, who had formerly been employed by F. & C. A. and B. then sent to the former clients and correspondents of F. & C. circulars announcing the dissolution of the partnership between the plaintiff and A., and the formation of the new firm of A. and B., who, "having purchased the entire interest of" the plaintiff "in the business of F. & C., . . . will continue to carry on the same business" at the place stated; and containing the following: "All inquiries relating to old matters formerly in the hands of F. & C. should be made of, and all communications addressed to," A. and B. They also sent to the correspondents of F. & C. a notice, as follows: "In all matters of business of F. & C. now in your hands, make all checks, drafts, etc. payable to the order of" A. and B. "only, and address all communications and correspondence to" A. and B. This was signed "F. & C." *Held*, that these facts did not entitle the plaintiff to an injunction against A. and B.

A bill in equity to restrain the doing of certain acts, which does not allege that the defendant was continuing to do such acts when the bill was filed, shows no ground for an injunction.

A person who was formerly in the employ of a firm, and who engages in a similar business, displaying upon his office a sign containing underneath his name the words "late of" the firm, will not be enjoined, if the sign is not painted in such a manner as to be likely to mislead the public.

The plaintiff in a suit in equity against A. and B. was formerly in partnership with

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A., carrying on a law and collection business under the name of "F. & C.," each owning a one-half interest in the firm. The plaintiff conveyed to A. the former's one-half interest "in the business of law and collections of the firm of F. & C.", except as stated in an instrument of even date signed by the two, reserving to himself "the name 'F. & C.,' excepting as agreed in said" instrument. In that instrument, A. conveyed to the plaintiff "all his right and interest in the name F. & C.," and reserved "the right only to advertise he was lately of said firm, and to indorse checks in that name for collection or deposit only that pertain to business now in the hands of F. & C. or their correspondents, and to collect bills now due said firm"; and agreed to vacate the office occupied by the firm by a day named, and assign his interest in the lease to the plaintiff, who retained the office. The instrument further provided that all cases pending in court should remain in the plaintiff's charge, "subject to the right of the clients." A. immediately took another office in the same building, and entered into partnership with B., an attorney at law, who had formerly been employed by F. & C. *Held*, that A. and B. had no right to advertise that they were the successors of F. & C. *Held, also*, that it was a violation of the agreement between the plaintiff and A. for the latter or his firm to solicit clients who had pending cases to withdraw them from the plaintiff's control, and to turn over the management of them to B.

A bill in equity by A. to restrain B. and C. from doing certain acts as partners, in violation of a written agreement executed by A. and B. upon the dissolution of a partnership existing between them, is not multifarious.

LATHROP, J. This is a bill in equity against Frank G. Nesbitt and William L. Quimby, to restrain them from doing certain acts, for an account, and for damages. In the Superior Court the defendants demurred to the bill for multifariousness, and for want of equity. The court sustained the demurrer, and dismissed the bill; and the case comes before us on the plaintiff's appeal.

In 1893 the plaintiff and the defendant Nesbitt were partners carrying on a law and collection business under the name of Farnsworth and Conant, each owning a one-half interest in the firm. This name, it must be assumed, was of value, as the business had been carried on since 1873, although the plaintiff and Nesbitt did not acquire a right to use it until 1881.

On September 9, 1893, the plaintiff conveyed to Nesbitt his one-half interest "in the business of law and collections of the firm of Farnsworth and Conant," except as stated in an instrument of even date signed by the two, reserving to himself, however, "the name 'Farnsworth and Conant,' excepting as agreed in said" instrument. There are other provisions in this instrument which will be referred to hereafter.

In the instrument referred to, Nesbitt conveyed to the plaintiff

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"all his right and interest in the name Farnsworth and Conant, with all the printed stationery and envelopes now on hand printed in that name, and rubber stamps in that name, except the check-books and draft-books now in the office and reference cards. Said Nesbitt reserves the right only to advertise he was lately of said firm, and to indorse checks in that name for collection or deposit only that pertain to business now in the hands of Farnsworth and Conant or their correspondents, and to collect bills now due said firm. Said Nesbitt to leave the telephone closet intact and vacate the office by September 16, 1893, and assign his interest in the lease to said" plaintiff, who assumed the rent on the lease. The instrument further provided as follows: "It is also mutually agreed that all pending cases in any court within the State of Massachusetts, including those in the United States Court in said Massachusetts, to remain under the charge of said Moses Holbrook in the same manner as heretofore, subject to the right of the clients, and that the name of W. L. Quimby, when the same now appears, to remain as at present, but the executions to be in charge of said Moses Holbrook, and he to have such assistance from said Quimby as may be agreed upon by said Holbrook and Quimby in the trial or enforcement of the same, and any such assistance as may be rendered by said W. L. Quimby to be without extra charge, and when such cases are wound up the proceeds to be turned over to the clients, and the net proceeds of costs and charges, after deducting disbursements necessary on enforcement or trial, to be divided equally between said Moses Holbrook and Frank G. Nesbitt." Cash on hand was to be divided equally, and bills due officers to be paid equally. Nesbitt assumed the other debts and liabilities of the firm.

The effect of these instruments was, in substance, that the plaintiff retained the office and the firm name and the conduct of cases pending in court, while Nesbitt was to have charge of the other business. He was at liberty, as there was no covenant to the contrary, to engage in the same or any other kind of business.

Immediately after the signing of the agreement Nesbitt took offices in the same building in which the business of Farnsworth and Conant had been carried on, and entered into partnership with

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Quimby, who sufficiently appears from the bill and exhibits to be an attorney at law, who before that time had been employed by Farnsworth and Conant.

1. The first ground of complaint is that the defendants sent circulars to the former clients and correspondents of Farnsworth and Conant, in which they falsely and fraudulently claimed and led the clients and correspondents to believe that they were the successors of Farnsworth and Conant, and sent a large number of such circulars in envelopes which belonged to the plaintiff, and that had the card "Farnsworth and Conant" on the outside, for the purpose of misleading the parties to whom the same were sent, without any right or authority from the plaintiff. Copies of this circular and envelope are annexed to the bill.

An examination of the circular does not, however, in our opinion, sustain the argumentative allegation of the bill that the defendants claimed therein to be the successors of Farnsworth and Conant. It is headed, "Offices of Quimby and Nesbitt." It sets forth the fact that the partnership existing between M. Holbrook and Frank G. Nesbitt, under the name of Farnsworth and Conant, is dissolved. It then recites the formation of the new firm of Quimby and Nesbitt, and states that, "having purchased the entire interest of said Holbrook in the business of Farnsworth and Conant, including all books, papers, documents, and assets of every kind and description and wherever located and being, excepting that said Holbrook retains his appearance in cases in court in this Commonwealth not yet gone to judgment unless otherwise requested by clients, the said Quimby and Nesbitt will, on and after September 16, 1893, continue to carry on the same business, in all its branches and details, at rooms 309 and 310 Sears Building, Boston, retaining all but one of the old employees of Farnsworth and Conant. . . . All inquiries relating to old matters formerly in the hands of Farnsworth and Conant should be made of, and all communications addressed to, 'Quimby and Nesbitt, Boston.'"

On the envelope complained of the following printed words appeared in one corner: "Return in five days to Farnsworth and Conant, Sears Building, Boston, Mass." There is no allegation in the bill that the use of such an envelope continues, and there is therefore no cause shown for an injunction on this ground.

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The plaintiff, however, contends that the words will "continue to carry on the same business" state in most unmistakable terms that the defendants are the successors of Farnsworth and Conant. But we are unable to take this view of the matter. With the exception stated in the circular, Nesbitt had the entire charge of the business of Farnsworth and Conant as it existed at the time the instruments were signed in 1893, and had, by the terms of the agreement, the right to carry it on. To say that he represented that his new firm was the successor of Farnsworth and Conant is something that we are unable to read into the circular.

2. The next contention is that the defendants had no right to send out to the correspondents of Farnsworth and Conant a notice on September 16, 1893, which reads as follows: "In all matters of business of Farnsworth and Conant now in your hands, make all checks, drafts, etc. payable to the order of Quimby and Nesbitt only, and address all communications and correspondence to Quimby and Nesbitt, Boston." This was signed "Farnsworth and Conant." This does not relate to new matter at all, but to matters then in the hands of the correspondents. By the express terms of the agreement Nesbitt had the right to use the name of Farnsworth and Conant in the collection of bills due, and in the indorsement of checks for collection or deposit that pertained to business in the hands of Farnsworth and Conant or their correspondents. We see no reason why he might not, as an incident of this, notify the correspondents of the old firm in the manner complained of.

3. The bill also alleges that the defendants are making an unwarranted use of the name of Farnsworth and Conant by displaying a painted sign upon their office in the following form: "Quimby and Nesbitt," underneath which names are the words "Late of Farnsworth and Conant," and still lower down the names in full of the two partners. This, so far as Nesbitt is concerned, is a right which he expressly reserved. As to Quimby, the bill alleges as follows: "That the said respondent Quimby has no right whatever to represent that he ever was of the firm of Farnsworth and Conant; that said Quimby was only an employee of the firm of Farnsworth and Conant, and has not now, and never had, any right to represent himself other-

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wise." After Quimby left the firm of Farnsworth and Conant, he had undoubtedly a right to represent that he was formerly in the service of the firm. This right of a former partner and of a former employee is settled in many cases. The only ground for the interference of a court of chancery in such a case is where the sign is painted in such a manner as to be likely to mislead the public, as in *Hookham* v. *Pottage*, L. R. 8 Ch. 91, where the defendant, who had been a partner with the plaintiff under the firm name of Hookham and Pottage, after the dissolution of the firm by a judicial decree which gave the business of the firm to the plaintiff, set up in the same business, and painted over the door the words, "S. Pottage, from Hookham and Pottage." The words "from" and "and" were in small capitals, and the other words in large capitals. Sir W. M. James, L. J. recognized the rule which we have stated, and granted an injunction solely on the ground that the mode in which the defendant had placed the names over the door was calculated to deceive the public. See also *Clark* v. *Leach*, 32 Beav. 14, 18; *Glenny* v. *Smith*, 2 Dr. & Sm. 476, 479; *Williams* v. *Osborne*, 13 L. T. (N. S.) 498, 501; *Hudson* v. *Osborne*, 39 L. J. (N. S.) Ch. 79.

We do not agree with the plaintiff's contention that the use of the word "of" amounts to a representation that Quimby was a partner in the firm of Farnsworth and Conant. The words "of" and "from" appear in the cases to be used indifferently as applicable either to a partner or to an employee. Thus in *Hookham* v. *Pottage* the retiring partner described himself as "from" the the old firm, and in *Foot* v. *Lea*, 13 Irish Eq. 484, an employee described himself as "of" the old firm, and an injunction was refused. There is nothing in the bill which shows that there was anything in the way the sign was painted to mislead the public.

To avoid misapprehension, it may be well to state that the court does not interfere to prevent the public from being misled, but "for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else." *Levy* v. *Walker*, 10 Ch. D. 436, 448. If what is done tends to mislead the public, it naturally diverts customers from the shop of the person entitled to use the firm name, and so injures his business.

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4. The bill further alleges that the defendants have advertised in substance that they are the legal successors in fact of Farnsworth and Conant, in books, periodicals, and newspapers, and further contemplate to publish such advertisements. The defendants contend that they have a right so to do; but we are of opinion that they have not.

It may be assumed that, if the instrument signed by Holbrook had said nothing about the firm name, the exclusive right to use this name would have vested in Nesbitt. *Hoxie* v. *Chaney*, 143 Mass. 592. *Churton* v. *Douglas*, H. R. V. Johns. 174. It may also be assumed that, inasmuch as Holbrook had only a one-half interest in the firm name when he reserved to himself the name "Farnsworth and Conant," he did not have thereafter the sole right to use that name. But in the instrument signed by both the partners Nesbitt conveyed to the plaintiff "all his right and interest in the name Farnsworth and Conant," with certain exceptions, which do not include the right to advertise that he was the successor of that firm. The name of an established firm is a part of the good will of the firm; and this, by the contracts of the parties, vested exclusively in the plaintiff, with the exceptions above referred to. The plaintiff also retained the lease of the office where the old firm did business. We find it impossible to say that the defendants had any right to announce that they were the successors of Farnsworth and Conant.

5. The bill also alleges that the defendants have violated the agreement by soliciting clients who had cases in court to withdraw said cases from the control of the plaintiff, and to turn over the management of them to the defendant Quimby. By the agreement signed by both partners, pending cases in this Commonwealth were to remain in the charge of the plaintiff, "subject to the right of the clients." It seems to us clear that it is a violation of this agreement for Nesbitt or his firm to do anything to disturb this arrangement. Apart from the cases referred to in the agreement, we have no doubt of the right of the defendants to solicit the customers of the old firm, there being no covenant in the agreement to the contrary, provided this is done in a fair manner. *Pearson* v. *Pearson*, 27 Ch. D. 145. *Vernon* v. *Hallam*, 34 Ch. D. 748. *Bristol, Cardiff, & Swansea Aërated Bread Co.* v. *Maggs*, 44 Ch. D. 616.

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The bill, however, does not allege that this soliciting was continuing when the bill was filed, and therefore does not show any ground for an injunction. As the case must go back to the Superior Court, it will be open to the plaintiff to move in that court to amend his bill, if the facts warrant it.

6. The objection taken by the defendants that the bill is multifarious, we are of opinion, cannot be sustained. The bill is brought against the members of a partnership for partnership acts. Nesbitt is bound by the terms of the agreements, but so far as he has rights under the agreements he can exercise them by his agents or servants, or by a partner. While Quimby did not sign the agreements, and was not a party to them, he is nevertheless entitled to do what Nesbitt can do, so long as he is in partnership with him. It is not a case of distinct parties with distinct interests. See *Lenz* v. *Prescott*, 144 Mass. 505; *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495, 499.

The result is, that the decree of the Superior Court must be reversed on the single ground that the defendants have no right to represent themselves as successors of the firm of Farnsworth and Conant. *Decree accordingly.*

W. I. Badger, (*L. Sullivan* with him,) for the plaintiff.

E. W. Hutchins, for the defendants.

JOSIAH E. DRAPER *vs.* J. CHARLES HOLLINGS & others.

Suffolk. December 4, 1894. — February 28, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Equity — Creditor's Bill — Interest in Partnership — Statute — "Debt" — Performance of Contract.

Upon a bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285, to reach and apply the defendant's interest in a copartnership in payment of a debt due the plaintiff from him, the court has the power to establish the plaintiff's debt, although he is not a judgment creditor.

A bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285, to reach and apply the defendant's interest in a copartnership in payment of a debt due the plaintiff from him, set forth an agreement in writing made on a certain day, whereby the plaintiff sold and the defendant bought an undivided

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one-half interest in another partnership then existing between the plaintiff and A., for a sum named, in six months from the date of the agreement, provided the plaintiff could buy from A. his interest; and alleged the immediate purchase by the plaintiff of A.'s interest, and a notification to the defendant thereof. *Held*, that the bill showed that there was a "debt" due from the defendant to the plaintiff, within the statute.

A bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285, to reach and apply the defendant's interest in a copartnership in payment of a debt due the plaintiff from him, set forth an agreement in writing made on a certain day, whereby the plaintiff sold and the defendant bought an undivided one-half interest in another partnership then existing between the plaintiff and A., for a sum named, in six months from the date of the agreement, provided the plaintiff could buy from A. his interest; that the plaintiff and defendant, on the same day the agreement was made, entered into written articles of copartnership, to continue until dissolved by the mutual agreement of the parties, which partnership was conditional upon the purchase by the plaintiff of A.'s interest in the partnership between him and A.; the immediate purchase of this interest and notification thereof to the defendant; and a delivery to the defendant of a bill of sale of a one-half interest in the tools and machinery formerly owned by the copartnership of the plaintiff and A., which tools and machinery constituted the whole of the property and assets of this copartnership; and that the defendant had ever since acted as a copartner with the plaintiff, and had never demanded any further or other assignment or conveyance of the same to him. *Held*, that the bill showed performance by the plaintiff of his part of the contract with the defendant.

LATHROP, J. This is a bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285, to reach and apply the interest of the first named defendant in a copartnership, composed of himself and the other defendants, in payment of a debt due the plaintiff from the first named defendant. The case comes before us on an appeal taken by the first named defendant from a decree rendered in the Superior Court in favor of the plaintiff.

1. The plaintiff at the time of filing his bill was not a judgment creditor, and the defendant contends that in such a case the jurisdiction of the court is limited to hearing evidence as to the fact of indebtedness, and, if it be found to exist, to issuing an injunction restraining the withdrawal of the interest of the copartner until the plaintiff obtains a judgment on the law side of the court. There is nothing, however, in the language of the St. of 1884 to indicate that, when the court sitting in equity has once acquired jurisdiction of the subject matter of the suit, it is not to go on and hear the case on its merits, and render a final decree. While the business of the partnership is not to

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"be interfered with by injunction or otherwise farther than to restrain the withdrawal of any portion of the debtor's share or interest therein, unless and until the plaintiff's debt is established," this does not say or mean "established at law," but established by the equity court. This plainly appears from what follows: "If either copartner shall give to the plaintiff a sufficient bond with sureties approved by the clerk, conditioned to pay to the plaintiff the amount of his debt and costs within thirty days after the same is established, the court shall proceed no further therein save to establish the debt." Here the court sitting in equity is to establish the debt, and there is no reason for supposing that the words "unless and until the plaintiff's debt is established," refer to its establishment in any other court.

2. The next contention is that the bill in equity does not show that there was a debt due from the defendant to the plaintiff. The bill sets forth an agreement in writing, made on October 22, 1892, whereby the plaintiff sold and the defendant bought an undivided one-half interest in a partnership then existing between the plaintiff and one F. E. Draper, for the sum of $2,000, in six months from October 22, 1892, provided the plaintiff could buy from F. E. Draper his interest. It also alleges the immediate purchase by the plaintiff of the interest of Draper, and a notification to the defendant thereof. The bill does not show a mere right of action for a breach of contract; but shows an agreement on the part of the defendant to pay a certain sum on the performance by the plaintiff of a certain act. On the performance by the plaintiff of his part of the contract a sum agreed upon is to be paid. This is undoubtedly a debt, within the statute.

3. The remaining contention is that the bill does not show performance by the plaintiff of his part of the contract of October 22, 1892. The bill, in addition to what has already been stated, sets forth that the plaintiff and the defendant, on the same day the agreement was made, entered into written articles of copartnership, to continue until dissolved by the mutual agreement of the parties, which partnership was conditional upon the purchase by the plaintiff of the interest of F. E. Draper in the copartnership of J. E. Draper and Company; the immediate purchase of this interest and notification thereof

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to the defendant; and a delivery to the defendant of a bill of sale of a one-half interest in the tools and machinery formerly owned by the copartnership of J. E. Draper and Company, which tools and machinery constituted the whole of the property and assets of this copartnership. It further alleges that the defendant has ever since acted as a copartner with the plaintiff, and has never demanded any further or other assignment or conveyance of the same to him.

The defendant contends that the plaintiff acquired by purchase from F. E. Draper a right to share in the surplus, if any, of the firm's property, after settlement of the partnership accounts, and that the defendant did not acquire this by a bill of sale of a one-half interest in specific tools and machinery. But the answer to this is that the bill alleges that these tools and machinery constituted all of the assets of the firm; and there is nothing in the papers before us to show that this was not the case.

No objection is taken by the defendant to the form of the decree. *Decree affirmed.*

R. D. Ware, for the first named defendant.

C. A. Snow, (*E. W. Burdett* with him,) for the plaintiff.

JAMES B. RICHARDSON & others, executors, *vs.* RACHEL N. WILLIS & another.

Suffolk. December 7, 1894. — February 28, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Will — Codicil — Construction — After-born Children.

After appointing executors and trustees a testator gave by his will to his trustees "as many thousand dollars as I shall have grandchildren at my decease, that is one thousand dollars to each grandchild, in trust." By a codicil which confirmed the will "so far as this codicil is consistent therewith," the testator directed his executors and trustees to pay to certain of his grandchildren, naming them, the sum of one thousand dollars each, within six months after his decease, "it being the amount bequeathed to them in my will in section third."

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Then follow the words, "The clause in section three in my will is amended in this codicil so that my executors and trustees are to receive one thousand dollars for each of the children of my son, C., and invest the same," etc. C. had three children living at the death of the testator, and two children were born subsequently. *Held*, that, taking the will and the codicil together, it was manifest that the testator intended to limit his bounty to his grandchildren living at his decease.

PETITION to the judge of probate of the county of Suffolk, by James B. Richardson, Henry C. Willis, and Richard C. Humphreys, executors of the will and codicil of Clement Willis, late of Boston, deceased, praying the instructions of the court as to their duties thereunder. At the trial in this court before a single justice, it was decreed that the decree of the Probate Court as to the construction of the third clause of the will and the seventh clause of the codicil, viz. "that the provisions therein made for the grandchildren of said testator apply to and include only those who were living at his decease, and do not apply to those born after his decease, and said executors are directed to pay said trustees the sum of one thousand ($1,000) dollars for each of the children of the said Charles J. Willis who were living at the death of said Clement Willis, but not to pay to said trustees any sum whatever for the children of the said Charles J. Willis born after the death of the said testator," be affirmed.

Rachel N. Willis and Claude J. Willis, children of Charles J. Willis, by their guardian *ad litem*, appealed to this court. The facts appear in the opinion.

C. F. Donnelly, guardian *ad litem*, for after-born grandchildren of the testator.

E. B. Hale, for the executors.

LATHROP, J. The will of Clement Willis appoints certain persons executors and trustees of his will. The third article of the will begins as follows: "I give to my trustees as many thousand dollars as I shall have grandchildren at my decease, that is, one thousand dollars to each grandchild, in trust." Then follow the terms of the trust, which need not be stated. By a codicil, which in terms confirms the will, "so far as this codicil is consistent therewith," the testator directs his executors and trustees to pay to certain of his grandchildren, naming them, the sum of one thousand dollars each, within six months after his

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decease, "it being the amount bequeathed to them in my will in section third." Then follows this paragraph: "The clause in section three in my will is amended in this codicil so that my executors and trustees are to receive one thousand dollars for each of the children of my son, Charles J. Willis, and invest the same as set forth in my will."

Charles J. Willis had three children living at the death of the testator, and two children, Rachel N. Willis and Claude J. Willis, were born subsequently. The only question presented in the case is whether the after-born children are within the terms of the codicil.

Taking the will and the codicil together, it is manifest that the testator intended to limit his bounty to his grandchildren living at his decease. And there can be no doubt that in construing the codicil we should read it in connection with the will. Thus, in *Gray* v. *Sherman*, 5 Allen, 198, 199, Chief Justice Bigelow speaks of it as a well established rule of law "that the will and codicil are to be taken and construed together as parts of one and the same instrument, speaking the language of the testator at the time of his death." See also *Chapin* v. *Parker*, 157 Mass. 63, and cases cited.

The result is that the decree of the single justice of this court must be *Affirmed.*

OLIVE D. LIVERMORE, administratrix, *vs.* FITCHBURG RAILROAD COMPANY.

Middlesex. January 8, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Railroad Accident — Grade Crossing — Ringing of Bell — Due Care — Negligence.

In order to recover damages of a railroad company under Pub. Sts. c. 112, §§ 212, 213, for causing the death of a person at a crossing, it must be shown that the deceased was in the exercise of due care, and that the defendant neglected to sound its whistle or to ring its bell as required by Pub. Sts. c. 112, § 163, as amended by St. 1890, c. 173, § 1.

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HOLMES, J. This is an action in two counts, under Pub. Sts. c. 112, §§ 212, 213, to recover damages for causing the death of the plaintiff's intestate by running him down at a crossing. To recover under § 212 it must be shown that the deceased was in the exercise of due diligence. To recover under § 213 it must be shown that the defendant neglected to sound its whistle or to ring its bell, as required by § 163 as amended by St. 1890, c. 173, § 1. *Tyler* v. *Old Colony Railroad*, 157 Mass. 336, 340. There was no evidence of either fact. The only evidence as to the bell is given by one witness, Harding, who was walking on the track and met the train about five or six hundred feet before it got to the crossing. As the train passed him the bell was ringing. After it passed him the witness could not say whether the bell rung or not, as he paid no attention to it. This is not a case where a witness said one thing at one time, and another thing at another, so that the jury must be allowed to decide between his statements, as in *Purple* v. *Greenfield*, 138 Mass. 1, 7. The plain meaning of the witness throughout was what we have stated. The mere fact that he cannot say that the bell rang, thus explained, is not evidence that it did not ring. All that the evidence shows is that at the one moment observed the engineer was doing his duty. *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386. *Hubbard* v. *Boston & Albany Railroad*, 159 Mass. 320. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 533.

There is no evidence as to what the plaintiff's intestate did at the crossing. When a man is killed in this way, and no neglect of duty on the part of the defendant is shown, such as naturally might have misled him, a jury is not warranted in presuming that he took the necessary precautions. The facts that sight and hearing of an approaching train were cut off by a hill, and that the train was late, do not supply the place of evidence. It is all a matter of presumption. The nature of the accident in some cases makes it improbable, according to common experience, that negligence on the plaintiff's side was a contributing cause, but it does not do so here. *Crafts* v. *Boston*, 109 Mass. 519.

Exceptions overruled.

C. Q. Tirrell, (*T. Hillis* with him,) for the plaintiff.

G. A. Torrey, for the defendant.

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FORT PAYNE COAL AND IRON COMPANY *vs.* WILLIAM A. WEBSTER.

Middlesex. January 9, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Promissory Note — Failure of Consideration — Breach of Contract — Right of Rescission — Waiver — Action — Corporation — Authority of Receiver — Evidence.

A paper writing signed by A. recited a sale of land by him to B., and a receipt of part payment in cash and an agreement to give two promissory notes for the balance, and contained an express covenant to convey the land to B. by a good and sufficient deed on payment of the notes. It also provided that, if B. should fail to make the payments, A. might consider the sale void so far as the agreement to convey land to B. was concerned, and might sell the land, giving notice to B. of the time and place of sale, and apply the proceeds in part payment of the notes. The notes were given in accordance with the agreement, and were of even date therewith, and the paper and the notes were parts of the same transaction. *Held*, in an action by A. against B. on the notes, that, in addition to the express covenant to convey the land to B. on his making the payments, there was an implied covenant to hold the land under the contract in readiness to be conveyed at the appointed time; and that a conveyance of the land before the maturity of the first note, which put it out of the power of A. to make a good title to B., was a breach of the contract which justified B. in rescinding it. *Held, also*, that a letter written by B. to the bank where the note was left for collection, stating that A. had failed to perform certain promises made when the note was given, and that until he did the things promised, "I do not feel like paying anything more on the land," was not a waiver of B.'s right to rescind the contract or to defend on the ground of A.'s breach of it; it not appearing that B. then knew what A. had done, nor that he intended to waive any rights, nor that A. took any action in reliance upon the letter.

If a promissory note is given to a corporation in part payment of land, which the corporation agrees by an instrument of even date to convey to the maker by a good and sufficient deed on payment of the note, and before the maturity of the note the corporation executes a trust deed of all its real estate, including that sold to the maker of a note to secure the payment of bonds which are issued and sold, there is a total failure of the consideration for the note, and no action can be maintained thereon by the corporation against the maker.

An appointment of a receiver of a corporation does not, apart from a statute or an order of court, make him so far the representative of the corporation that he can bring suits for it in his own name, or bind it by admissions *in pais* made outside of the performance of his official duties.

A corporation sold land to A., taking his promissory note in part payment, and executing an instrument of even date by which it agreed to convey the land to A. by a good and sufficient deed on payment of the note. Before the note matured, the corporation made a trust deed of all its real estate, including that

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sold to A., to secure the payment of bonds which were issued and sold. In an action in the name of the corporation against A. upon the note, the defence to which was a failure of consideration, a report made by a receiver of the corporation to the stockholders, bondholders, and creditors, which did not appear to have been made in the performance of any official duty, but apparently was volunteered with a purpose to serve the interests of persons connected with the corporation, was admitted in evidence. The nature of the receivership did not appear. *Held*, that the report was not admissible.

KNOWLTON, J. This is an action on two promissory notes, which are identical in form, except that one is payable in one year and the other in two years from date. The defences set up are false and fraudulent representations on the part of the plaintiff, and a failure of consideration. No question of pleading is intended to be raised. The case appears to have been tried at length on the question of fraud, upon which the evidence was conflicting, but the verdict was finally rendered on the other branch of the case, the plaintiff's counsel excepting to the rulings given, and consenting that a verdict might be taken for the defendant, subject to the question whether there was error of law at the trial.

Each of the notes contains recitals of special provisions which have reference to a contract for a sale of land from the plaintiff to the defendant, which is more fully set out in a writing bearing even date with the notes, and executed by the plaintiff when the notes were given. This writing and the notes were parts of the same transaction, and are to be considered together in determining the rights of the parties. The paper signed by the plaintiff recited the sale and a receipt of part payment in cash and an agreement to give the notes for the balance of the price, and contains an express agreement to convey the land to the defendant by a good and sufficient deed on payment of the notes. It provided that, if the defendant should fail to make the payments, the plaintiff might consider the sale void so far as the agreement to convey land to the defendant is concerned, and might sell the land, giving notice to the defendant of the time and place of sale, and apply the proceeds in part payment of the notes. In addition to the express covenant to convey the land to the defendant on his making the payments, there was an implied covenant to hold the land under the contract in readiness to be conveyed at the appointed time. The land so to be held for the

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plaintiff, and so to be conveyed, constituted the only consideration for the notes. There was evidence tending to show that, several months before the first note became due, the plaintiff made a trust deed of all its real estate, including the land sold to the defendant, to secure payment of bonds to the amount of $300,000, and that bonds to an amount of considerably more than $200,000 secured by this deed were issued and sold. The evidence also indicated that the plaintiff, at the time of the trial, was insolvent.

The implied covenant to hold the title for the benefit of the defendant, and to have the land ready to be conveyed free from encumbrance when the payments should be made, was of the essence of the contract for which the notes were given, and a conveyance of the land which put it out of the power of the plaintiff to make a good title to the defendant was a breach of the contract which justified the defendant in rescinding it. If the land was conveyed away, so that it no longer existed as land which the plaintiff could convey to him in performance of the contract, he might properly decline to proceed further with the contract, and treat the notes as promises whose consideration had wholly failed. It was the plaintiff's own fault that it broke the contract to keep the land for the defendant. When it disposed of the land, it could not justly ask him to pay for it. The promise to pay the last note was a stipulation dependent on an express stipulation of the plaintiff to convey the land by a sufficient deed. The stipulation to pay the first note was dependent on an implied contract of the plaintiff not to dispose of the land before the note became due, nor to do anything which should imperil his right to have a proper deed on payment of the second note. *Newcomb* v. *Brackett*, 16 Mass. 161. *Stone* v. *Fowle*, 22 Pick. 166, 174. *Swan* v. *Drury*, 22 Pick. 485. *Packard* v. *Usher*, 7 Gray, 529. *Welch* v. *Matthews*, 98 Mass. 131. *Kenerson* v. *Henry*, 101 Mass. 152. *Hapgood* v. *Shaw*, 105 Mass. 276. *Gormley* v. *Kyle*, 137 Mass. 189. *Lowe* v. *Harwood*, 139 Mass. 133. *Linton* v. *Allen*, 147 Mass. 231. *Judson* v. *Wass*, 11 Johns. 525, 528. *Tucker* v. *Woods*, 12 Johns. 190.

We are of opinion that the defendant's letter of October 8, 1891, written to the bank where the note was left for collection, was not a waiver of his right to rescind the contract or to de-

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fend on the ground of the plaintiff's breach of the contract.* It does not appear that he then knew what the plaintiff had done, nor that he intended to waive any rights, nor that the plaintiff took any action in reliance upon the letter. *Newcomb* v. *Brackett*, 16 Mass. 161. *Swan* v. *Drury*, 22 Pick. 485. *Gerrish* v. *Norris*, 9 Cush. 167. *Holdsworth* v. *Tucker*, 143 Mass. 369, 376. We are of opinion that the instructions to the jury at the trial were substantially correct.†

The plaintiff took exception to the admission in evidence of a report made by one Sheldon, receiver of the plaintiff corporation, to the stockholders, bondholders, and creditors. This report does not appear to have been made in the performance of any official duty, but apparently was volunteered with a purpose to serve the interests of persons connected with the corporation. The nature of the receivership does not particularly appear. The suit is brought in the name of the corporation, although the report shows that it was brought with the knowledge and assent of the receiver, and was conducted by him. An appointment of a receiver does not, apart from a statute or an order of court, make him so far the representative of the corporation that he can bring suits for it in his own name, or can bind it by admissions *in pais* made outside of the performance of his official duties. *Battle* v. *Davis*, 66 N. C. 252. *Freeman* v. *Winchester*,

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* This letter was as follows: "The note which you hold was given the Fort Payne Coal and Iron Co. for land purchased of them. At time of sale they made promises of what they were going positively to do, and told of other things contemplated. They have failed to do any of these things, and until they do them I do not feel like paying anything more on the land."

† The instructions were as follows: "If, prior to the date of the writ, in accordance with a vote of the stockholders of the plaintiff corporation, but after the sale by auction to the defendant, all the real estate of the company, including the lot for which these notes were given, was subjected to a mortgage, or deed of trust, to secure payment of the sum of $300,000, under which bonds to the amount of $227,200 were issued; and if also, prior to the date of this writ, but after the sale by auction to the defendant, all the real estate of the company, including the lot for which these notes were given, was sold for taxes, — as stated in the report of the receiver, which has been put in evidence, — then the plaintiff corporation has put it out of its own power to give the defendant a deed of the lot in question, and to give him a valid conveyance of the lot; there has been a total failure of consideration for these notes, and the plaintiff cannot recover."

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10 Sm. & M. 577. *Garver* v. *Kent*, 70 Ind. 428. *Moriarty* v. *Kent*, 71 Ind. 601. It may be that the appointment of this receiver was such as to make him an assignee of the corporation's property, authorized to sue for it in his own name and to bind the corporation by admissions *in pais;* but this does not appear, and upon the record before us we think the evidence was wrongly admitted. For this reason only there must be a new trial.

Verdict set aside.

S. J. Elder & E. A. Whitman, for the plaintiff.

B. B. Johnson, for the defendant.

CHARLES LANG *vs.* JOSEPH C. TERRY.

Bristol. January 10, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Due Care — Law and Fact — Evidence.

In an action for personal injuries, it appeared that the plaintiff was employed as a deck hand on a barge owned by the defendant, which was fitted with a derrick and boom, block and falls, and a steam hoisting engine to operate the same; that another barge also belonging to the defendant came alongside with a load of spiles, which were to be transferred to the first named barge; that as the plaintiff was engaged in putting some boards over an iron casting on the deck near the bow of the boat, in accordance with directions of the captain, he was struck and injured by a spile which was being so transferred without the use of a guide rope, and which did not swing from the derrick as it was intended to, but caught in the boat's rigging and then swung against the plaintiff; that a warning was given him to look out just as he was struck, but he did not have time to avoid the blow; that he could have seen the spile before it struck him, if he had been looking for it; and that he had been employed on the boat for several years, and had seen similar work done there, a guide rope being sometimes but not always used. He testified that he knew they were going to lift the spile when they got ready, and every one was out of the way, but he did not suppose they were ready to start when they did. A witness testified that, from the time they began to fasten the spile to the derrick chain until the signal was given to hoist, it was two or three minutes, but the hoisting itself occupied about a second. *Held*, that it was a question of fact for the jury whether the plaintiff was in the exercise of due care.

In an action for personal injuries received by the plaintiff, who was a deck hand on the defendant's boat, from the blow of a swinging spile which was being transferred from another boat owned by the defendant, by means of a derrick and steam hoisting engine, without the use of a guide rope, a witness who was

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an expert in the manner of using derricks and hoisting timbers was asked the following question: "Whether or not, having heard the derrick described, a derrick equipped as this was, without a guide rope, is a safe and proper derrick to raise spiles of that kind?" to which he answered, "No." He was then asked, "What would be the usual and proper way of attaching a guide rope there?" referring to the hoisting in question; and, in his answer, described the method to be used. *Held*, that the questions and answers were properly admitted in evidence.

TORT, for personal injuries received by the plaintiff, while in the defendant's employ, from the blow of a swinging spile. Trial in the Superior Court, before *Sherman*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that, on the day of the accident, he was employed by the defendant on a vessel called the Daisy, which was a barge or lighter about sixty feet in length, without motive power of its own, but fitted with a derrick and boom and accompanying block and falls, and a steam hoisting engine to operate the same; that the only persons employed on the Daisy at that time were Walter Terry, the captain of the boat, and the plaintiff, who were also the only hands belonging to that boat; that Terry was over the plaintiff, who obeyed his orders; that the Daisy was at a wharf in Fall River, and, together with another vessel called the Archer, and also belonging to and engaged in the defendant's business, was unloading spiles about thirty-five feet in length; that the Archer was a steam barge, and was also fitted with a derrick and steam hoisting engine similar to those on the Daisy, and on the day of the accident had a crew of five men, employees of the defendant; that the Archer came alongside of the Daisy with a load of spiles, of which six had been transferred and the remainder were being transferred from the deck of the Archer to the deck of the Daisy; that the crew of the Archer fastened a chain around a spile, then by means of the Archer's derrick and engine raised the spile from the Archer's deck and lowered it so as to rest transversely across the rails of the two boats, and finally fastened the Daisy's chain around the spile, and by means of the derrick and engine of the latter boat laid the spile lengthwise on the Daisy's deck; that the plaintiff had nothing to do with fastening the spiles or hoisting or lowering them on either boat, except that he would occasionally lend a hand in taking hold of the spile and steadying it

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into place on the Daisy's deck, and at the time was doing other things on the deck besides helping to steady the spiles; that several minutes before the accident, he was standing on the after part of the Daisy, and was sent by Terry to put some boards over an iron casting which projected four inches above the deck at about ten feet from the bow; that he then had to go the length of the boat and hunt up two pieces of board which he then fixed around the casting; that he laid the boards down, and while there, as he went to turn away, he heard some man sing out, "Look out, Charlie"; that he just turned his head, saw a shadow, and felt a shock, and that was all he remembered; that when he had gone along with the boards and had put them down, he did not have time to look around to see what they were doing, and after he heard the cry of "Look out," he did not have time to get out of the way; that when he started forward to cover the casting the men were not in the act of hoisting on board of the Daisy, and at the time he went forward they were hoisting over there, but although it was possible for him to see the hoisting he did not take notice of it; that from the time he started with the boards to the time of the blow from the spile it was three or four minutes; that he did not notice whether they were using guide ropes in the hoisting to control and direct the course of the spiles; that, if they were not using one, there was no guide rope on board either boat; that at previous times he had seen them hoisting and put on a guide rope to keep the spiles from swinging, and sometimes they hoisted without a guide rope; that he had worked on the Daisy eight or nine years; that during the last five years of that period a similar operation of transferring spiles from the Archer to the Daisy had occurred perhaps once or twice when he was present; that he knew the men came there to transfer the spiles from the Archer to the Daisy, and that they were going to hoist them with those derricks; that the work of hitching the spiles on to the derrick and of hoisting them was in his plain view when he was looking at them; that he knew they were going to lift the timber when they got ready, and everybody was out of the way, and did not suppose that they were ready to start when they did; that the work of transferring the spiles previously begun and carried on had been suspended

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while some old lumber was being removed from the Daisy's deck to make room for additional spiles; and that the work of transferring the spiles did not begin again until he started forward.

William F. Bennett testified for the plaintiff that he was captain of the Archer on the day of the accident, and saw the accident happen; that the plaintiff was within three or four feet of the smoke-stack; that the end of a spile thirty-five feet in length struck the plaintiff between the shoulders, knocking him down and breaking his leg; that the spile was hung on the Daisy's boom, and no guide rope was used; that the spile swung very near the place where it was intended to swing, but caught against the ratlines on the rigging of the Daisy, and caused the end to lift a little, and so fell upon the plaintiff; that, to the best of his recollection, the plaintiff had turned away from the smoke-stack when struck, and was about sidewise to the spile; that there was nothing to obstruct his view from the spile, if he had looked that way; that from the time the spiles began to be chained on the derrick until the signal was given to hoist, it was two or three minutes, and that the hoisting itself occupied about a second; that the defendant had no storehouse where he kept appliances, tools, and ropes, except on board the boat; and that there were plenty of ropes on board the boat.

Robert Nicholson, after having been qualified as an expert in the manner of the use of derricks and the hoisting of timbers, particularly on barges similar to the Daisy, was asked the following question: "Whether or not, having heard the derrick described, a derrick equipped as this was, without a guide rope, is a safe and proper derrick to raise spiles of that kind?" and answered, "No." The defendant objected to the question and answer, but they were admitted; and the defendant excepted. The witness then testified as to what a guide rope consisted of, and that there ought to be a hook attached to it; that properly it ought to be fastened to the hook in the block when raising a stick of timber like the spile; and that the guide rope was to keep the stick from going away from where it ought to go.

The same witness was also asked the following question: "What would be the usual and proper way of attaching a guide rope there?" referring to the hoisting on the Daisy. To which

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he answered: "To take that hook, and hook right into the block to keep the boom and fall from swinging too fast after it is raised from its bearing." This question and answer were admitted, against the defendant's objection; and the defendant excepted.

Walter D. Terry testified for the defendant that he had been engaged in the business thirteen years; that he did not use a guide rope for hoisting spiles when two vessels were side by side; and that they considered it safer without them.

At the close of the evidence, the defendant asked the judge to direct a verdict for the defendant, upon the ground that the plaintiff had failed to offer sufficient evidence of his due care; but the judge refused so to do.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

R. W. Nason, for the defendant.

J. W. Cummings, for the plaintiff.

KNOWLTON, J. The principal exception saved in this case was to the refusal of the presiding justice to rule that there was no evidence of due care on the part of the plaintiff.

At the time of the accident, the plaintiff was engaged in the performance of his duty, putting some boards over an iron casting on the deck near the bow of the boat, in accordance with the direction of the captain. He was struck by a swinging spile which was hoisted by a derrick and steam hoisting engine for the purpose of being transferred from the steam barge to the barge on which he was working. The spile was hoisted and swung around without the use of a guide rope. It appears that he could have seen the spile before it struck him if he had been looking for it, and he testified that he knew they were going to lift the timber when they got ready and everybody was out of the way; but he did not suppose they were ready to start when they did. There was evidence that a warning was given him to look out just as he was struck, but not in time to enable him to avoid the swinging timber. One witness testified that the hoisting, after the chain was fastened to the spile, occupied only about a second.

We are of opinion that it was a question of fact for the jury on the evidence, whether the plaintiff had such reason to expect

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the hoisting of the spile without warning, and the swinging of the spile in a dangerous way, as to require him in the exercise of ordinary care to watch the operation of the hoisting engine, and look out for himself. They might think that he had reason to expect that the spile would not be hoisted while he was at work over the grating without first giving him warning, or that it would not swing in such a way as to strike him. It cannot be said, as matter of law, that in the performance of his duty under orders from the captain he was obliged to anticipate such a danger, or to rely solely on his own watchfulness to guard against an injury which could only come from the negligence of others. *Magee* v. *West End Street Railway*, 151 Mass. 240. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532. See also *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13; *Maher* v. *Boston & Albany Railroad*, 158 Mass. 36; *Lynch* v. *Allyn*, 160 Mass. 248.

The questions to the expert, and his answers, were rightly admitted in evidence. There was nothing to show that there was any dispute in regard to the way in which the derrick was equipped, or that the answers of the witness involved any matter of opinion except upon subjects about which he could properly testify as an expert. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131. *Poole* v. *Deane*, 152 Mass. 587.

Exceptions overruled.

JACOB ELLIS *vs.* LEWIS GINSBURG.

Suffolk. January 11, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Power of Court to set aside Verdict and order New Trial.

While a judge, in acting upon a motion for a new trial of an action, must conform to the rules of the court and to the settled principles of law, the pendency of such a motion does not annul or suspend his power upon his own motion to set aside the verdict and order a new trial "for any cause for which a new trial may by law be granted," under Pub. Sts. c. 153, § 6.

If a motion to set aside the verdict in an action because contrary to the evidence

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could not be granted, for the reason that a rule of the court had not been complied with, and another motion to set aside the verdict because of newly discovered evidence could not be granted, for the reasons that the evidence was not in the legal sense newly discovered, or was cumulative, or was in contradiction of the moving party and his other witnesses, or because the failure to produce it at the trial was not accounted for or excused, or for other like reasons, nevertheless if in dealing with those motions the judge became convinced that legal grounds existed for ordering a new trial, and for that reason alone set the verdict aside and ordered a new trial, if he had evidence before him from which he could find facts which made a "cause for which a new trial may by law be granted," under Pub. Sts. c. 153, § 6, it is immaterial how he may have ruled in answer to the requests made in the hearing of the motions.

A new trial of an action "may by law be granted," under Pub. Sts. c. 153, § 6, where the court is satisfied that, by reason of some accident, mistake, or misfortune in the conduct of the trial, a new trial is necessary to prevent a failure of justice.

CONTRACT upon two promissory notes, and for money had and received.

At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the plaintiff; and the defendant filed a motion for a new trial, on the ground that the verdict was against the evidence and the weight of the evidence, but failed to deliver a copy thereof to the plaintiff's attorney, as required by Rule 46 of that court. The defendant subsequently filed another motion to set aside the verdict, and for a new trial, on the ground of newly discovered evidence, and also filed in support of the latter motion the affidavits of Abraham Bilafsky, Thomas P. Kennedy, Morris Fleischer, and Louis Goldsmith, respectively. Bilafsky stated that he was a witness at the trial, and that in his testimony he "unintentionally made a mistake in regard to the facts" which he testified to, and gave the particulars as to which his testimony was incorrect. The other affiants were not witnesses at the trial, Fleischer and Goldsmith deposing as to certain conversations had with the plaintiff after the trial.

The two motions were heard together, and the defendant offered no excuse for failing to produce the witness Kennedy at the trial, except that the importance of his evidence had not been anticipated. The plaintiff objected to the allowance of the first motion, on the ground that no copy of the motion had been delivered to him, as required by Rule 46 of the court; and the judge for that reason took no action on this motion.

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The plaintiff also objected to the allowance of the second motion, because the affidavits contained no legal ground for setting aside the verdict and ordering a new trial; because the affidavit of Bilafsky contained no new evidence, but only a change of testimony on a point on which the witness had been fully examined and which had been called to his attention at the trial; because the point was not material to the issue in the case; because the new testimony, as offered by the affidavit, was in direct contradiction of the defendant and of the other witnesses offered on his behalf, and was cumulative, and tended to corroborate the plaintiff's evidence; because the new evidence offered in the affidavit of Kennedy was in direct contradiction of the defendant and of the other witnesses offered on his behalf; and because the failure to produce the witness at the trial was in no way accounted for or excused. The judge overruled the plaintiff's objections to the allowance of this motion, ruled and found that the affidavits showed legal grounds for ordering a new trial; and for that reason alone set aside the verdict and ordered a new trial, but said that on the affidavits of Fleischer and Goldsmith alone he would not grant a new trial. The plaintiff alleged exceptions.

H. E. Warner, for the plaintiff.

P. H. Cooney, for the defendant.

BARKER, J. The record before us shows abundant power in the justice of the Superior Court to set aside the verdict and to order a new trial. Under Pub. Sts. c. 153, § 6, "The courts may, at any time before judgment in a civil action, set aside the verdict, and order a new trial, for any cause for which a new trial may by law be granted." This power may be exercised by the court of its own motion; and while in acting upon motions for a new trial made by parties to the cause the court must conform to the rules of the court and to the settled principles of law, the pendency of a motion for a new trial made by a party does not annul or suspend the power of the court, upon its own motion, to set aside the verdict and order a new trial for any cause for which a new trial may by law be granted. So in the present case, assuming that the judge could not grant the defendant's motion to set aside the verdict because contrary to the evidence for the reason that Rule 46 had not

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been complied with, and that he could not grant the defendant's motion to set aside the verdict because of newly discovered evidence, for the reasons that the evidence was not in the legal sense newly discovered, or was cumulative, or was in contradiction of the defendant and his other witnesses, or because the failure to produce it at the trial was not accounted for or excused, or for other like reasons, nevertheless if in dealing with those motions the judge became convinced that legal grounds existed for ordering a new trial, and did for that reason alone set the verdict aside and order a new trial, he was justified in so doing upon his own motion, and, if he had evidence before him from which he could find facts which made a "cause for which a new trial may by law be granted," it is immaterial how he may have ruled in answer to the requests made in the hearing of the defendant's motions. A new trial may by law be granted where the court "is satisfied that, by reason of some accident, mistake, or misfortune in the conduct of the trial, a new trial is necessary to prevent a failure of justice." *Greene* v. *Farlow*, 138 Mass. 146. *Cutler* v. *Rice*, 14 Pick. 494. *De Giou* v. *Dover*, Anst. 517. *Richardson* v. *Fisher*, 1 Bing. 145. The statements of the bill of exceptions show abundant reason to justify the judge in finding upon the affidavits and his own knowledge of the trial such mistake and misfortune. It is not stated that he granted the defendant's motion, and it is the fair inference from the bill of exceptions that the presiding justice acted independently of that motion in setting the verdict aside.

Exceptions overruled.

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MARY A. C. HOLMES *vs.* EBEN D. JORDAN.

Norfolk. January 14, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Levy — Officer's Return on Execution — Service on Debtor — Posting of Notification — Validity of Sale — Statute — "Equity" — "Lands" — Variance — Amendment.

An officer's return on an execution levied upon land of the debtor contained the following recital: "I gave notice in writing to the within named judgment debtor of the time and place of sale by leaving the same at her last and usual place of abode, and by mailing a like notice to her address, as described in said execution, in a securely sealed envelope, fully prepaid." *Held*, that this return satisfied the requirements of Pub. Sts. c. 172, § 46, and showed sufficiently, (in the absence of evidence to the contrary,) that the place of service was within the officer's precinct, and was the last and usual place of abode of the debtor.

Under Pub. Sts. c. 172, § 29, providing that the officer shall give notice in writing to the debtor of the time and place of the sale of land on execution, and "shall also cause notifications thereof to be posted up in some public place in the city or town where the land lies, and also in two adjoining cities or towns if there are so many in the county," the posting of one notification in the town where the land lies is sufficient.

The recital in an officer's return upon an execution, that he took "all the right in equity" which the debtor then had "to redeem the following described mortgaged real estate," does not invalidate a sale of the land upon the execution, although at the time of the levy there had been no breach of the condition of the mortgage.

The word "lands," in an execution directing the officer to cause the debt to be satisfied "of the goods, chattels, or lands of the said judgment debtor," embraces any interest authorized by the law to be taken.

If an execution issued upon a judgment recovered by the plaintiff as executor recites a recovery by him personally, and it appears from the record that this defect is merely a clerical error, an amendment will be allowed as of course from the record without other evidence, and the execution may be treated as amended in the trial of a writ of entry to recover land sold on the execution.

WRIT OF ENTRY, to recover a parcel of land lying partly in Brookline and partly in Boston. Plea, *nul disseisin*. Trial in the Superior Court, without a jury, before *Braley*, J., who found for the tenant; and the demandant alleged exceptions, which appear in the opinion.

B. B. Jones, (*S. L. Whipple* with him,) for the demandant.

J. H. Benton, Jr., for the tenant.

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HOLMES, J. The exceptions in this case relate to the validity of a sale on execution of land belonging to the demandant. The first one argued is that the officer's return does not show a valid notice in writing of the time and place of the sale to the demandant, the debtor, as required by Pub. Sts. c. 172, § 29, if the debtor is found within his precinct. The return reads, "I gave notice in writing to the within named judgment debtor of the time and place of sale by leaving the same at her last and usual place of abode, and by mailing a like notice to her address, as described in said execution, in a securely sealed envelope, fully prepaid." The objection that the return does not state expressly that the debtor was not found within the officer's precinct, based on the decisions under the corresponding section of the Gen. Sts. c. 103, § 41, (*Owen* v. *Neveau*, 128 Mass. 427, *Parker* v. *Abbott*, 130 Mass. 25, *Bayley, petitioner*, 132 Mass. 457, *Sawyer* v. *Harmon*, 136 Mass. 414, 415,) is met by Pub. Sts. c. 172, § 46, (St. 1881, c. 207,) passed soon after the decision in *Parker* v. *Abbott*. This provides that any notice required to be given to the debtor under that chapter "may either be served upon him personally, or left at his last and usual place of abode." The alternative of service by leaving the notice at the last and usual place of abode, which formerly was allowed by St. 1798, c. 77, § 4, is restored by this section. *Croacher* v. *Oesting*, 143 Mass. 195, 196. See *Parker* v. *Abbott*, 130 Mass. 25, 26, 27. The return *prima facie* means that the place where the service was made was within the officer's precinct, that is, it is to be presumed in the absence of evidence to the contrary that the service was made where the officer had authority to make it. *Richardson* v. *Smith*, 1 Allen, 541, 543. The return also sufficiently establishes that the place of service was the last and usual place of abode. There is no evidence which even attempts to contradict it. *Stewart* v. *Griswold*, 134 Mass. 391, 393. *Wolcott* v. *Ely*, 2 Allen, 338, 340. *Bott* v. *Burnell*, 11 Mass. 163, 165. Freem. Ex. (2d ed.) §§ 387, 365.

It is objected that the officer was required by the same § 29 to cause two or more notifications to be posted up in Brookline, where the land lies. The language of the section is, "shall also cause notifications thereof to be posted up in some public place in the city or town where the land lies, and also in two adjoining

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cities or towns if there are so many in the county." Apart from history, no one would doubt, we think, that the plural "notifications" was used with reference to the several cities or towns in which notifications are required, notwithstanding the words "and also." In fact, however, the plural is a survival from St. 1798, c. 77, § 4, which required the posting up of notifications in two or more public places in the town where the land lies. The Rev. Sts. c. 73, § 39, substituted "some public place" for "two or more public places," and thereby made one notification sufficient.

The next objection urged is that the officer returns that he took "all the right in equity" which the debtor then had "to redeem the following described mortgaged real estate," whereas at the time there had been no breach of condition, so that the debtor's right was a right at law alone. The expression used is inaccurate, no doubt, but illustrations are not necessary to show that the term "equity of redemption" is used in common speech to describe the title of a mortgagor without regard to whether the condition has been broken. A striking one will be found in the definition given by the Century Dictionary under the word "equity." The words of the return, although a little more formal than "equity of redemption," and throwing a little more emphasis on the possible antithesis between equity and law, in our opinion are to be taken in the popular sense, and do not invalidate the sale.

The execution was in the usual form, directing the officer to cause the debt to be satisfied "of the goods, chattels, or lands of the said judgment debtor." The word "lands" in this connection embraces any interest authorized by law to be taken. See Pub. Sts. c. 172, §§ 1, 27; c. 171, § 20; c. 3, § 3, cl. 12. The recital in the return that the officer had deposited a copy of the execution in the clerk's office and also in the registry of deeds, with a memorandum upon it stating that it had been placed in his hands "for the purpose of taking the lands" of the debtor, merely follows the execution, and does not affect the question before us.

The only other objection argued is that the execution is not supported by the judgment because the judgment was recovered by the plaintiffs in an action of contract wherein in the writ

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they were described as executors of the will of Oliver Ames, whereas the execution recites a recovery by them personally. It appears from the record that the defect is merely a clerical error. An amendment would be allowed as of course from the record, without other evidence. Under such circumstances the writ may be treated as amended in this proceeding. *Dewey* v. *Peeler*, 161 Mass. 135, 136, and cases cited. Freem. Ex. (2d ed.) §§ 71 *a*, 67. *Exceptions overruled.*

ALICE J. MEARS *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. January 14, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Loss of Life — Railroad — Due Care — Negligence — Death without Conscious Suffering.

In an action against a railroad corporation under the employers' liability act, St. 1887, c. 270, for causing the death of A., it appeared that he was killed while inspecting cars in the defendant's freight-yard by being crushed by a car that was one of two box cars thrown against the car on which he was working by another car kicked off from a train and run on a descending grade with no brakeman upon it until it struck the two cars which were left standing on the track with a space of about six or eight feet between them and the car at the end of which he was working; that he was in the performance of his duty, which required him to inspect the running gear, draw-bars, links, and pins of cars left on the track where he found the car which he was inspecting; that he had no notice that a car was to be kicked off and sent down the grade without a brakeman upon it, so as to strike the two cars as it did; that these two cars were so situated as to cut off from his view the car which was approaching; and that it was contrary to the rule of the railroad corporation to kick off cars and send down a car in that way upon that track. *Held*, that there was evidence tending to show that A. was in the exercise of due care, and that the conductor of the train was negligent.

In an action against a railroad corporation under the employers' liability act, St. 1887, c. 270, for causing the death of A., who was struck by a car while he was engaged in his duty of inspecting cars in the defendant's freight-yard, the evidence tended to show that his body was crushed; and a witness, who was near him at the time of the accident, testified that he was "stone dead" when the witness reached him. He also testified that A. took two or three steps after he was struck, and then fell. *Held*, that there was evidence that A. died without conscious suffering.

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TORT, under the employers' liability act, St. 1887, c. 270, by the widow of John Mears, for causing his death. Trial in the Superior Court, before *Dunbar*, J., who, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

L. M. Child, for the plaintiff.

W. I. Badger, for the defendant.

KNOWLTON, J. The plaintiff's husband was killed while inspecting cars in the defendant's freight-yard by being crushed by a car that was one of two box cars thrown against the car on which he was working by another car kicked off from a train, and run on a descending grade with no brakeman upon it until it struck the two box cars which were left standing on the track with a space of about six or eight feet between them and the car at the end of which he was working. There was evidence tending to show that he was in the exercise of due care. He was in the performance of his duty, which required him to inspect the running gear, draw-bars, links, and pins of cars left on the track where he found the car which he was inspecting. He had no notice that a car was to be kicked off and sent down the grade without a brakeman upon it, so as to strike the two cars which stood six or eight feet from that on which he was working. The two box cars were so situated as to cut off from his view the car which was approaching. It was contrary to the rule of the road to kick off cars and send down a car in that way upon that track. It was a question of fact whether he used such care as was reasonable in the circumstances in which he was placed. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532.

There was also evidence that he died without conscious suffering. The testimony tended to show that his body was crushed, and a witness who was near him at the time of the accident testified that he was "stone dead" when the witness reached him. What was said in regard to his taking steps did not necessarily imply any voluntary action or consciousness on his part.*

* This witness also testified that Mears took two or three steps after he was struck, and then fell.

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There was evidence tending to show that the conductor in charge of the train was negligent in violating a rule of the road in allowing the car to be kicked off and run down the track without a brakeman upon it, and without warning the plaintiff or seeing whether there were persons working under the cars who might be hurt. The jury might well find that his negligence in these matters was a direct cause of the accident.

We are of opinion that, upon the whole case, there was evidence in favor of the plaintiff which should have been submitted to the jury. *Exceptions sustained.*

CATHERINE FLOYTRUP *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. January 15, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Usage — Due Care — Negligence — Evidence.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff while alighting from a train which had arrived within the limits of a station, although not at the portion of the station at which its passengers were expected to leave it, evidence of the usage of the road that one train should not enter a station while another train was engaged in delivering passengers there, is competent upon the question whether the defendant's servants managed the train in a proper manner; and if the plaintiff knew of it bears also upon the question whether he used due care.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff while alighting from a train, it appeared that the train had arrived within the station but not at that portion of it where passengers were expected to leave the train. The stop was made, not to deliver passengers, but to allow another train to deliver its passengers. The plaintiff's evidence tended to show that three passengers preceded him and had alighted, and that while the train remained stationary he had one foot off the lower step when the train started without warning and threw him upon the platform. The defendant's evidence tended to show that the train stopped from thirty seconds to a minute, and that it was again in motion when the plaintiff was on the second step from the top, the car having four steps, and that the train continued in motion while he descended the remaining steps and stepped from the train. The plaintiff offered evidence to show that when the train reached the station, and before it stopped, the words, "Lynn, change for Boston," were called by some one so as to be audible to the passengers, and in the manner in which stations are usually announced. The evidence was excluded because it did not appear that the call was made by any person employed by the defendant. *Held*, that whether the announcement was

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made by a railroad man or by another person, it was competent both upon the question whether the plaintiff's conduct was careful, and upon the question whether the defendant's servants used due care to prevent him from alighting at a time when the train was not stopped to deliver passengers.

If, as a train is about to stop within the limits of a station, not to deliver passengers, but to allow another train to deliver its passengers, an unauthorized announcement of the station is made accompanied by a direction to "change" for another station, it is a question for the jury whether the fact that such a call has been publicly made does not impose upon the carrier a duty to give a counter warning that passengers are not yet to leave the train, and whether it may be found to be negligence on the part of the carrier to suffer a passenger to go upon the platform, without warning, for the purpose of leaving the train under such circumstances.

In an action against a railroad corporation for personal injuries occasioned to a passenger in alighting from a train within the limits of a station where the train had stopped, not to deliver passengers, but to allow another train to deliver its passengers, testimony of a brakeman that he did not hear an authorized announcement of the station accompanied by a direction to "change" for another station is competent as bearing upon the question whether it was his duty to warn passengers who appeared to be about to leave the train that it had not stopped to allow them to alight; and testimony offered in rebuttal, that such an announcement was made, has some tendency to contradict the testimony of the brakeman, and is admissible for that purpose.

TORT, for personal injuries occasioned to the plaintiff while alighting from a train of the defendant in the station at Lynn, on the evening of December 29, 1892. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the defendant, and the plaintiff alleged exceptions, the nature of which sufficiently appears in the opinion.

J. F. Libby, for the plaintiff.

S. Lincoln, for the defendant.

BARKER, J. The evidence of the usage of the road, that one train should not enter a station while another train was engaged in delivering passengers there, was competent upon the question whether the defendant's servants managed the train in a proper manner; and if the plaintiff knew of it, it bore also upon the question whether she used due care. There was evidence that she had frequently used the railroad between Lynn and Marblehead, and this was evidence from which the jury might have found that she knew of the usage. The evidence of the usage was therefore rightly admitted. *O'Neill* v. *Lynn & Boston Railroad*, 155 Mass. 371.

The remaining question is whether the evidence offered by the plaintiff, that when the train reached Lynn, and before it

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stopped, "Lynn, change for Boston," was called by some one, was admissible. This evidence was excluded because it did not appear that the call was made by any person employed by the defendant. This was while the plaintiff was putting in her case. In the putting in of the defendant's evidence, after the conductor had testified that he did not then announce the station, Lynn, and the brakeman had testified that he did not call out the name of Lynn as the station when the train came to the place where it stopped to wait while the other train discharged its passengers, the brakeman was asked, "Did you hear any one call, 'Lynn, change for Boston'?" and answered, "No, sir." In rebuttal, the plaintiff again offered the testimony excluded in chief relative to the calling of the station.

Upon the undisputed evidence, the train had arrived within the limits of the station at Lynn, although not at the portion of the station at which its passengers were expected to leave it, and had completely stopped when the plaintiff started from her seat to leave the car. The stop was not made to deliver passengers, but for the purpose of allowing another train to deliver its passengers in the same station. The plaintiff's evidence tended to show that three passengers preceded her in leaving the car, and had alighted from the train, and that while the train remained stationary she had got as far as the lower step, and had one foot off the step in the act of alighting, when the train started suddenly and without warning, and threw her upon the platform. The defendant's evidence tended to show that the train stopped from thirty seconds to a minute, and that it was again in motion when the plaintiff was upon the second step from the top, the car having four steps, and that the train continued in motion while she descended the remaining steps and stepped from the train.

We understand from the offer that the words, "Lynn, change for Boston," were called out in the train so as to be audible to the passengers and in the manner in which stations are usually announced. Evidence that such an announcement was so made would of itself perhaps be some evidence that it was made by a servant of the defendant, as no one else would have a right to make such an announcement. But however that may be, we think that evidence that such an announcement was made when

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the train reached Lynn, and before it stopped, whether the announcement was made by a railroad man or by any person, was competent both upon the question whether the plaintiff's conduct was careful and upon the question whether the defendant's servants used due care to prevent her from attempting to leave the train at a time when it was not stopped to deliver passengers. A passenger hearing such an announcement cannot be presumed to know that it is not made by the authority of the carrier, and, if the plaintiff did not know that the announcement was unauthorized, she was justified in preparing to alight when the train stopped. *England* v. *Boston & Maine Railroad*, 153 Mass. 490, 492. As affecting the question whether she was in the exercise of due care, the evidence was the more important, because of the defendant's contention that she knew the usage under which the train had stopped, not to deliver passengers, but for the purpose of avoiding danger to passengers leaving another train. If in the exercise of due care she supposed that the train had stopped to enable passengers to leave it, and it did not start until she was in the act of descending the steps, the fact that the train had started before she left it did not of itself prevent her recovery, if she did not know that it had started. *Merritt* v. *New York, New Haven, & Hartford Railroad*, 162 Mass. 326. From all the evidence the jury might have found that the train started when she was upon the second step from the top, but that she did not perceive that it was in motion until she had got as far as the lower step, and had one foot off in the act of alighting.

So too, if, as a train is about to stop at a station for such a purpose as that for which the defendant's train was stopped, an unauthorized announcement of the station is made accompanied by a direction to "change" for another station, we think it a question for the jury whether the fact that such a call has been publicly made does not impose upon the carrier a duty to give a counter warning that passengers are not yet to leave the train, and whether it may be found to be negligence on the part of the carrier to suffer a passenger to go upon the platform, without warning, for the purpose of leaving the train under such circumstances.

Finally, we think that the testimony of the brakeman that he did not hear any one call, "Lynn, change for Boston," was com-

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petent as bearing upon the question whether it was his duty to warn passengers who appeared to be about to leave the train that it had not stopped for the purpose of allowing them to alight, and that the testimony, offered in rebuttal, that such an announcement was made had some tendency to contradict the testimony of the brakeman, and should have been admitted for that purpose also. *Exceptions sustained.*

ELLEN CONNELLY, administratrix, *vs.* HAMILTON WOOLEN COMPANY.

Essex. January 16, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Assumption of Risk — Negligence — Evidence.

If a person who voluntarily undertakes to whitewash the walls and ceiling of a card-room in a mill while the machinery is in operation, and who has been specially cautioned to look out for the pulleys and shafting, receives injuries which cause his death by coming in contact with a revolving shaft, as a result apparently of losing his balance while at work standing upon an elevated staging, no action can be maintained, either at common law or under the employers' liability act, St. 1887, c. 270, for his injuries; and it is immaterial that there was a keyway in the end of the shaft which made it more likely to catch his clothing than a plain shaft, the shaft being in the same condition when he was hurt as when he began to whitewash the room.

In an action for personal injuries occasioned to the plaintiff's intestate while in the defendant's employ, by coming in contact with a revolving shaft having a keyway in the end, the evidence of a witness called as an expert to show that a keyway in a shaft enhances the ordinary dangers of a revolving shaft is properly excluded.

TORT, for personal injuries occasioned to the plaintiff's intestate, James Connelly, resulting in his death, while employed in the defendant's mill, by the alleged negligence of the defendant. The declaration contained two counts, one under the employers' liability act, St. 1887, c. 270, and the other at common law. Trial in the Superior Court, before *Bond*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

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J. P. Sweeney & R. E. Burke, for the plaintiff.

J. W. Cummings & E. A. McLaughlin, for the defendant.

BARKER, J. Without passing upon the question of notice, the plaintiff's exceptions must be overruled. Upon the evidence, no cause of action is shown, either at common law or under the statute. The plaintiff's intestate voluntarily undertook the very dangerous work of whitewashing the walls and the ceiling of a card-room, while the machinery was in operation. The dangers to which this work exposed him were open and obvious. He was capable of fully understanding them, and must be taken to have comprehended them. Besides this, he had been specially cautioned to look out for the pulleys and shafting, and it was by coming in contact with a shaft, apparently as a result of losing his balance while at work standing upon an elevated wooden horse or staging, that he was caught and injured. It is urged that there was a keyway in the end of the shaft which made it more likely to catch his clothing than a plain shaft. But the keyway was not a defect, and the shaft was in the same condition when he was hurt as when he began to whitewash the room. The danger of being caught by contact with the shaft, whether he knew of the keyway or not, was so great and obvious, that he must have appreciated and taken upon himself the risk of being caught and injured by coming in contact with the shaft. It was not necessary that he should appreciate every particular of the danger. *Downey* v. *Sawyer*, 157 Mass. 418, 420. Nor does the case show that his employer failed in any respect in his duty to the deceased. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153, 160, and cases cited.

The evidence of the expert was properly excluded.* It is a matter of common observation that a shaft in which a keyway with sharp edges is sunk is more likely to take up clothing than a plain shaft. *Exceptions overruled.*

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* The questions put to the witness were as follows:

"1. With this shafting in the position it has been described here, revolving at the rate of 250 revolutions a minute, will you please state what danger would be apprehended or is to be apprehended from such a shafting?

"2. Does a keyway in a shaft enhance or appreciate the ordinary dangers of a revolving shaft, if so, how?"

The counsel for the plaintiff stated that he desired to show by this witness

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MARY LYONS, administratrix, *vs.* BOSTON TOWAGE AND LIGHTERAGE COMPANY.

Suffolk. January 21, 22, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Due Care — Negligence — Explosion caused by Torch held by Fellow Workman.

An employee cannot recover for personal injuries received while painting the inside of a tank by the explosion of gas generated by the varnish used by him, which explosion was caused by a lighted torch held by a fellow workman at the employee's suggestion, if there is no evidence that the varnish was different from what the employee had used for twelve years, or that the employer knew of any difference, or that he contemplated the use of a torch.

TORT, for personal injuries received and sufferings endured by the plaintiff's intestate previous to his death. Trial in the Superior Court, before *Sherman*, J., who, upon the evidence offered by the plaintiff, and at the request of the defendant, directed a verdict for the defendant; and the plaintiff alleged exceptions.

L. M. Child & T. H. Buttimer, for the plaintiff.

J. Lowell, Jr., (*S. H. Smith* with him,) for the defendant.

HOLMES, J. The plaintiff's intestate, Michael Lyons, was ordered to paint the inside of a tank with black varnish. While he was doing so, and a fellow workman was holding a torch for him at his suggestion, the fumes of the varnish caught fire from the torch, and he was burned so badly that he died. Lyons had worked for the defendant twelve years. It was part of his regular business to paint this and other tanks, and he had done so a good many times. Black varnish was the paint used. The tank had to be painted about once a year.

We assume that black varnish is dangerous in the sense that it is liable to generate inflammable fumes, but any dangers incident to the use of black varnish in general the defendant had

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that such a keyway enhances the ordinary dangers of shafting by reason of the fact that it affords a projection, or an edge upon the shafting, which is more likely to take up clothing than the shafting would itself.

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every reason to believe to be as well known to Lyons as to itself. After twelve years he would be supposed to have taken the risk of them. There was no evidence that the varnish used on this occasion was of inferior quality, or different from what always had been used, except the fact of the accident. There was no evidence that the defendant knew of the difference, if there was any. There was no evidence that it contemplated the use of a torch, which came from Lyons's own suggestion.* We do not perceive any particular in which the defendant fairly can be said to have failed in its duty.

Exceptions overruled.

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* The bill of exceptions recited that the tank was in the hold of a lighter at the wharf, and was an iron cylinder about sixteen feet long, and about four feet high and four feet wide. It was in the lower part of the lighter, and the only opening to the same was a manhole in the end, an oval opening about a foot and a half in diameter and about one foot in width. There was evidence that this tank was used to contain water to supply the steam engine on the lighter; that this tank had to be painted about once a year; that the paint that was used for that purpose was of a kind known as black varnish; that it was kept in the storehouse of the defendant, and was the only kind of paint there; that the foreman told Butler to paint the tank; that he, in accordance with the usual mode of doing that work, went to the storehouse and got a pot of black varnish and a lantern. He then went down to the lighter and crawled into the tank with the lantern and commenced work. After working there about half an hour the gas that arose from the varnish which was on the inside of the tank became so strong that Butler crawled out of the tank and went back to the foreman and told him he did not want to work any longer there, because the gas arising from the varnish was too strong for him. The foreman then told him to go back there and he would send Lyons to assist him and they could take turns in the tank. Thereupon Butler went back to the tank and was shortly after joined by the plaintiff's intestate. Lyons got into the tank and was handed a lighted lantern by Butler. After a few minutes the light in the lantern went out, and after having been trimmed and relighted it went out again.

There was upon the lighter a torch, and when the light went out the second time, Lyons suggested that they might use the torch. Thereupon Butler took the torch and lighted it and held it outside of the tank within about a foot of the manhole so as to give light to Lyons within the tank. This light or some artificial light was necessary for the purpose of doing the work, as there was no light within the tank, and no opportunity to procure any except artificial light. While Butler was so holding the torch for the purpose of giving light, and Lyons was at work painting the tank, the gas that was generated by the varnish ignited from the torch; whereupon Butler cried out. Lyons jumped and put his hands on the edge of the tank for the pur-

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ELLEN F. LYNCH *vs.* WARREN J. RICHARDSON.

Middlesex. January 22, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Duty and Liability of Keeper of Livery Stable in furnishing Horse — Inference of Knowledge of Viciousness of Horse.

It is the duty of the keeper of a livery stable to furnish to a hirer a horse which does not have a vicious habit of running and kicking, and if he knows of the existence of such habit in a horse, or if, by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous, he is liable for such injuries as result from his wrongful conduct.

If the keeper of a livery stable lets to a hirer a horse somewhat advanced in years, which he has owned for more than a year, and which has long had a habit frequently manifested of viciously kicking and trying to run away when started for home after having been out for a considerable time, and this viciousness has been known before the owner bought it to persons who never owned the horse, in an action against the owner for injuries occasioned by the viciousness of the horse to the hirer, who was free from fault and in the exercise of due care, the jury will be warranted in inferring knowledge on the part of the defendant of such viciousness.

TORT, for personal injuries occasioned to the plaintiff by the alleged viciousness of a horse let to one Michael H. Lynch, the husband of the plaintiff, by the defendant, who was a livery stable keeper in Waltham. Trial in the Superior Court, before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that, on November 1, 1891, Michael H. Lynch sent to the defendant by his sons, who were fourteen and sixteen years old respectively, a written order, "Please deliver to the bearer a horse and two-seated carriage or carryall and charge the same to my account"; that the defendant received and read the order, and then directed an employee to harness a horse, which was delivered to the two boys, who took the horse to the plaintiff's house; that the plaintiff, with her two sisters, a daughter, and the younger of the

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pose of crawling out, and the gas that minute exploded and blew Lyons out of the tank through the manhole into the hold of the lighter, causing injuries from which he died in forty-eight hours.

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two boys, left her home in Waltham and went to Newton Upper Falls; that, on leaving the latter place, the horse was very restless, and after going a short distance commenced to run and kick, and continued so to do for a quarter of a mile; that the boy examined the harness, carriage, and horse, and saw that there existed no cause for the horse's viciousness; and that they continued on their way home, and for a mile and a half the horse went all right, until, reaching a point at the top of a hill which was nearly a quarter of a mile in length, the horse began to kick and run, and, descending the hill, crossed a railroad track, when the reins broke, and the horse, in turning on a certain street, overturned the carriage, and the plaintiff was thrown out and received the injuries complained of.

One Callaghan, who was called as a witness for the plaintiff, testified that he had known the horse about three or four years; that it was owned by one Carney of Waltham, and by him sold to one McAuliffe, and by McAuliffe sold to the defendant; that he knew the horse while owned by Carney about a year and a half; that McAuliffe owned it about six months, to the best of his knowledge and belief, before he sold it to the defendant; that during the year and a half that he knew it while Carney owned it, and just prior to his selling it to McAuliffe, he had seen the horse several times; that he had seen it driven and knew it to be a vicious horse; that if it was away from the stable at meal hours it would try to run and kick; and that he saw it at one time when it had tried to kick and run with Carney's son.

Carney testified that he and his son owned the horse together as copartners in the wood and coal business; that the horse had been used to drive and work in their business; that he did not know the age of the horse, and did not know how old it was when he bought it; that it was a horse of an uncertain age; that it was a vicious and ugly animal; that it had tried to run away with him twice, the only occasions on which he drove it; that when starting to run and kick it would drop its ears back, and this was its habit when it had been driven some distance from home and was starting towards home, especially after meal times; that it was always ugly to strangers, and would not allow a stranger to come into its

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stall without trying to kick him, and would press a person against the stall in a vicious manner; and that, when he and his son dissolved copartnership, they sold this horse to McAuliffe, who owned it about six months, and then sold it to the defendant.

Thomas J. Lynch, who was driving the horse at the time of the accident, testified that when leaving Newton Upper Falls the horse commenced to run and kick, and continued running and kicking for about half a mile; that it laid back its ears and acted as though it was accustomed to run away; that it then drove kindly and safely for a mile and a half, until they arrived at the top of a hill; that it then started to run away, and continued kicking and running down the hill; and that he used every effort to stop it until the reins broke, which was the last that he remembered.

The plaintiff testified that he heard the defendant say, immediately after the accident, that if he had known the boy was going to drive this horse he would not have let him have it. There was evidence tending to show that the boy who drove the horse on that occasion had been accustomed to driving and handling horses for several years.

The defendant requested the judge to rule that, upon the evidence, no cause of action appeared; and that there was no evidence that the defendant knew that the horse was vicious.

The judge so ruled, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

G. L. Mayberry, for the plaintiff.

B. B. Johnson, for the defendant.

KNOWLTON, J. The defendant was a keeper of a livery stable, and the plaintiff's husband hired of him a horse and carriage for use by the plaintiff and other members of his family. The horse furnished under the contract was advanced in years, and there was evidence from which the jury might have found that it had long had a habit of viciously kicking and trying to run away when started for home, after having been kept out for a considerable time. There was also evidence tending to show that the plaintiff and her driver were free from fault, and in the exercise of due care. It was the duty of the defendant to furnish a horse that had no such vicious habit, and

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if he knew of the existence of the habit, or if, by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous, he is liable for such injuries as resulted from his wrongful conduct. *Horne* v. *Meakin*, 115 Mass. 326. *Copeland* v. *Draper*, 157 Mass. 558.

A verdict was ordered for the defendant solely on the ground that there was no evidence that he knew of the viciousness of the horse. There was no direct evidence of such knowledge, but we think there was evidence from which the jury might well have inferred that he knew the facts. The evidence would have warranted the jury in believing that the habit was of such a kind as to be frequently manifested. It was the duty of the defendant to try to inform himself in regard to the habits of horses kept in his stable for use in his business. It does not require a very long acquaintance with a horse to enable an ordinary livery stable keeper to form a correct opinion of its qualities. Usually he tries to ascertain as much as possible about it before becoming its owner. In the present case the evidence indicates that different persons who never owned this horse knew of its viciousness before the defendant bought it. It does not very definitely appear how long the defendant had it before the accident, but there is evidence tending to show that it was between one and two years. Callaghan testified "that he had known the horse about three or four years; that it was owned by one Carney of Waltham, and by him sold to one McAuliffe, and by McAuliffe sold to the defendant; that he knew the horse while owned by Carney about a year and a half; and that McAuliffe owned it about six months, to the best of his knowledge and belief, before he sold it to the defendant." This evidence well warranted a finding without direct testimony that the defendant knew whether or not the horse had a vicious habit of running and kicking.

Exceptions sustained.

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NICHOLAS WHITE *vs.* CITY OF MEDFORD.

Middlesex. January 22, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Land Damages — Evidence.

At the trial of a petition for the assessment of damages caused by laying out and constructing a way over land, which was a stone quarry, the rock of which extended beyond the limits of the location, the respondent city has no ground of exception to the admission of evidence that rock claimed to be suitable for quarrying, and situated on the petitioner's remaining land adjacent to the way, had been shattered in constructing the way by the explosion of dynamite in large drill-holes sunk very deeply, as shown by marks in the faces of the rock; and it is immaterial whether the work of constructing the way was done by the servants of the city, or by an independent contractor.

An exception will not be sustained to the exclusion of evidence which the bill of exceptions does not show to have been material.

PETITION, for the assessment of damages caused by the laying out and construction of a way called Governor Avenue in the defendant city over land of the petitioner, which was a stone quarry, including damages to his remaining land. At the trial in the Superior Court, before *Mason*, C. J., the jury returned a verdict for the petitioner; and the respondent alleged exceptions, which appear in the opinion.

B. F. Hayes, for the respondent.

J. E. Cotter & R. M. Saltonstall, for the petitioner.

BARKER, J. The bill states four exceptions taken by the respondent at the trial of a petition for the assessment of damages by reason of the laying out and construction of Governor Avenue over land of the petitioner, including damage to his remaining land. The first and third exceptions have been waived.

The second exception was to the introduction of evidence that rock claimed to be suitable for quarrying, and situated on the petitioner's other or remaining land adjacent to the avenue, had been very much shattered in constructing the road by the explosion of dynamite in large drill-holes sunk very deeply, as shown by marks in the faces of the rock. It was in evidence that the

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road was constructed under the authority of the city by a contractor under a written contract, which is set out, and the ground of the objection was that the work of construction was done by an independent contractor. It is needless to discuss the question whether the relation of the contractor to the city was such that the city was not liable for negligence of the contractor in its performance. The respondent's exception was merely to the admission of the evidence. He makes no complaint of any instruction as to its use, nor are the instructions of the court to the jury mentioned in the bill of exceptions. That portion of the petitioner's land included in the location of the road was a quarry which had been used and operated for many years, and the rock extended beyond the limits of the location. The duty imposed upon the city to build a road in such a locality required it to excavate the rock within the limits of the location. We do not understand that the evidence tended to show that drill-holes had been made or dynamite exploded outside of the limits of the road, but that the explosion of dynamite in the rock within the limits had shattered the adjacent rock. If this was a necessary effect of excavating the roadway by reasonable blasting of the rock within its limits, without causing which the road could not be properly constructed, the city was liable for it upon this petition, whether the work was done by an independent contractor or by its own servants, and if it was not a necessary result of excavating the rock within the limits of the road the city would not be answerable for it in this petition, whether done by a contractor or by its servants. *Dodge* v. *County Commissioners*, 3 Met. 380. *Brown* v. *Providence, Warren, & Bristol Railroad*, 5 Gray, 35. If answerable for it at all in the latter case, the city would only be answerable in an action of tort. Upon one view of the case, namely, that the shattering of the adjacent rock was something which must necessarily result from the removal of the rock within the limits of the way in any reasonable and practicable manner, the evidence was admissible, and the exception must be overruled.

The remaining exception was to the exclusion of a question asked by the respondent to a witness called by it to show that the stone in the petitioner's quarry was of poor quality, and so difficult to be worked as to be of no value. He testified that, having

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taken a job of paving in Medford for the city, it was part of the contract that the city should give him the stone, and that he was to break or cut it into the necessary blocks; that the stone was of the same kind as that of the petitioner's quarry, and was upon land adjoining and close to that quarry, and was as easy to get out; but that it was so expensive to get the stone into blocks that he was obliged to abandon it and purchase stone elsewhere; and that the stone he so purchased cost less delivered than it cost him to get out the stone given to him by the city. He further testified that the petitioner's quarry could not be worked at a profit, and that the property taken had no value for a quarry. He was then asked where he obtained the stone which he had purchased, and the respondent's exception is to the exclusion of this question. It does not appear what answer the question was intended to bring, and it is not shown that the question was material. *Exceptions overruled.*

PATRICK TANGNEY *vs.* MICHAEL SULLIVAN.

Suffolk. January 28, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Malicious Prosecution — Exceptions — Pleading — Action.

If an action for malicious prosecution is brought to this court by exception to the refusal of a ruling that, upon all the evidence, the plaintiff cannot maintain his action, and the bill of exceptions only purports to set forth all the evidence showing that the defendant acted in or controlled the prosecution, and not all the evidence in the case, that point alone will be considered, and the question whether the plaintiff failed to make out a want of probable cause is not open.

If all the counts of a declaration are for the same cause of action, it will not avail the defendant to have some of them held to be bad or unsupported so long as one stands.

It is not a defence to an action for malicious prosecution that a third person swore to the complaint, if he acted in good faith on the defendant's information, and the defendant intentionally induced him so to do.

HOLMES, J. This is an action for malicious prosecution. It comes before us by exception to the refusal of a ruling that, upon all the evidence, the plaintiff could not maintain his action. But

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as the bill of exceptions only purports to set forth all the evidence showing that the defendant acted in or controlled the prosecution, not all the evidence in the case, our consideration must be confined to that point. Whether, as the defendant argues, the plaintiff failed to make out a want of probable cause, is not before us. Also the ruling asked dealt with the evidence, not with the pleadings. See *McLean* v. *Richardson*, 127 Mass. 339, 344; *Batchelder* v. *Batchelder*, 2 Allen, 105, 106. And further, as all the counts are for the same cause of action, it would do the defendant no good if some of them were held to be bad or unsupported, so long as one stood. *West* v. *Platt*, 127 Mass. 367, 371.

There was evidence not only that the defendant took an active part in setting the law in motion, but that he alone brought about the prosecution by his oral complaint, that he intended to do so, and stated that to be his object in making the complaint when he made it. The fact that, according to the practice in the court where the criminal proceedings were had, the chief of police signed and swore to the written complaint, does not save the defendant if he intentionally induced the chief of police to do so, acting in good faith on the defendant's information. See *Gibbs* v. *Ames*, 119 Mass. 60, 66; *Woodworth* v. *Mills*, 61 Wis. 44, 55, 56, 60; *Kline* v. *Shuler*, 8 Ired. 484, 486; *Danby* v. *Beardsley*, 43 L. T. (N. S.) 603, 604; 2 Greenl. Ev. § 450.

Exceptions overruled.

F. Hunt, for the defendant.

J. H. Ponce, for the plaintiff.

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COMMONWEALTH *vs.* DENNIS McCARTHY.

Norfolk. January 28, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Intoxicating Liquors — Evidence — Exceptions.

At the trial of a complaint for keeping a liquor nuisance evidence was introduced that four men drove up to the defendant's house; that one of them entered and then returned with a bottle, from which they all drank; that one of them went back and came out with the bottle filled again; and that the defendant accompanied him as far as the piazza and stood there as they drove away. It did not appear from the bill of exceptions that this was all the evidence in the case. *Held*, that it could not be said that the evidence was inadmissible; it might have been made competent by other evidence; although the court did not mean to intimate that, if it stood alone, it would be incompetent.

COMPLAINT, for keeping a liquor nuisance in a dwelling-house at Canton, between August 1, 1893, and January 1, 1894. At the trial in the Superior Court before *Sherman*, J., one Plunkett, the complainant, a police officer, testified that on September 10 four men drove up to the defendant's house; that one entered and then returned with a bottle in his hand; that they had a drink and emptied the bottle; and that then one of them went back into the house and came out with the bottle filled again, the defendant accompanying him as far as the piazza, and standing there as they drove away.

The defendant objected to the admission of this testimony. The judge admitted it.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

P. Daly, for the defendant.

R. O. Harris, District Attorney, for the Commonwealth.

MORTON, J. It does not appear from the exceptions that the testimony that was objected to was all that was introduced at the trial. That being so, it is manifest that we cannot say that it was inadmissible. It may have been made competent by other evidence. We do not mean to intimate that if it stood alone, it would have no tendency to show that the defendant kept a liquor nuisance in his house. *Exceptions overruled.*

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COMMONWEALTH *vs.* SIDNEY S. KELLY.

Suffolk. January 28, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Oleomargarine — Statute — Repeal — Constitutional Law.

Oleomargarine artificially colored by annatto so as to cause it to look like yellow butter produced from pure unadulterated milk, or cream from the same, is within the prohibition of St. 1891, c. 58, § 1, which statute has not been repealed, and is constitutional and valid as applied to oleomargarine so colored.

HOLMES, J. The defendant sold oleomargarine artificially colored by annatto so as to cause it to look like yellow butter produced from pure unadulterated milk, or cream from the same. It is settled that oleomargarine so colored is within the prohibition of St. 1891, c. 58, § 1, that the act has not been repealed, and that it is constitutional and valid as applied to oleomargarine so colored. *Commonwealth* v. *Huntley*, 156 Mass. 236. *Plumley* v. *Massachusetts*, 155 U. S. 461. *Commonwealth* v. *Russell*, 162 Mass. 520. We may add, that, if evidence could be considered to controvert facts manifestly assumed by the Legislature to be true, it is apparent from the testimony of the defendant's witnesses that oleomargarine can be made, and is made and sold, without this coloring matter. In view of the above decisions, the case does not seem to us to need a fuller discussion.

Exceptions overruled.

C. W. Bartlett & H. M. Ayars, for the defendant.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

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COMMONWEALTH *vs.* JENNIE SHEEHAN & another.

Middlesex. January 28, 1895. — February 28, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Confession — Evidence.

At the trial of a criminal case it appeared that the defendant had a conversation at the police station with the chief of police, who, before testifying as to the conversation, testified that no inducement or promise was held out to the defendant and no threats were made, and that the defendant said what he did freely and voluntarily; and the exceptions recited that "full and appropriate instructions were given to the jury." *Held*, that the defendant had no ground of exception.

INDICTMENT against Jennie Sheehan and Peter Gauthier for adultery. At the trial in the Superior Court, before *Fessenden*, J., it appeared in evidence that the defendants were arrested at the same time and were taken to the police station, and that while there the defendant Sheehan had a conversation with the chief of police, who, before he was allowed to testify as to the conversation, testified that no inducement or promise was held out to the defendant and that no threats were made, and that the defendant said what she did freely and voluntarily. This was all the evidence offered or heard upon the question of the competency of the evidence as to the conversation.

The defendant Sheehan objected to the admission of the evidence of the conversation. The judge admitted it; and the defendant Sheehan excepted.

Full and appropriate instructions were given to the jury.

The jury found the defendants guilty; and the defendant Sheehan alleged exceptions.

A. V. Lynde, for the defendant Sheehan.

F. N. Wier, District Attorney, for the Commonwealth.

MORTON, J. The exceptions state that "full and appropriate instructions were given to the jury." It must be assumed, therefore, that the jury were appropriately instructed regarding the weight to be given to any statements or confessions made by the defendant Sheehan to the chief of police. There is nothing

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tending to show that the statements and confessions were not admissible. *Commonwealth* v. *Myers*, 160 Mass. 530. The exception to the admission of the conversation between the defendants has not been argued, and must be understood as waived.

Exceptions overruled.

JEROME MARBLE & others *vs.* JAMESVILLE MANUFACTURING COMPANY & another.

Worcester. October 2, 1894. — March 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Petition in Insolvency against Corporation — Statute — Dissolution of Attachment.

A petition in insolvency cannot be maintained against a corporation which failed to dissolve an attachment within the time provided in Pub. Sts. c. 157, § 136, but dissolved the same before the actual filing of the petition. KNOWLTON, J. dissenting.

The attorney of an attaching creditor has authority to release the attachment, and a paper addressed to the register of deeds reciting that the attachment is dissolved and requesting that such fact be noted on the record of attachments, signed by the attorney, and delivered to the debtor's attorney for the purpose of dissolving the attachment, has the effect to dissolve it at once, and before the entry is made on the record.

PETITION IN EQUITY, under Pub. Sts. c. 157, § 15, to revise a decision of the Court of Insolvency dismissing a petition for the issuing of a warrant against the respondent corporation. The case was heard and reserved by *Barker*, J. for the determination of the full court. The facts appear in the opinion.

The case was argued at the bar in October, 1894, and afterwards was submitted on the briefs to all the judges.

F. P. Goulding, (*E. H. Vaughan* with him,) for the petitioners.

H. W. King & C. M. Rice, for the respondent corporation.

W. S. B. Hopkins & F. B. Smith, for the Judge of Insolvency.

ALLEN, J. The question in this case is whether a petition in insolvency can be maintained against a corporation which failed

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to dissolve an attachment within the time provided in Pub. Sts. c. 157, § 136, but dissolved the same before the actual filing of the petition.

It has been held in England, that a clear, unequivocal act of bankruptcy could not be explained by any subsequent circumstances, but where the act was in itself doubtful it might be explained. *Hopkins* v. *Ellis*, 1 Salk. 110. *Colkett* v. *Freeman*, 2 T. R. 59. Robson, Bankruptcy, (7th ed.) 133. Assuming, without discussion, that this would be adopted here as a general rule, we have to consider whether the course of legislation in this Commonwealth shows an intention to place the failure to dissolve an attachment on different ground, and to require that such failure shall continue to the time of filing the petition against the debtor, in order to serve as a basis for involuntary proceedings in insolvency.

The original provisions for involuntary proceedings in insolvency against an individual are found in St. 1838, c. 163, § 19. Three grounds are specified: 1st. If a person arrested on mesne process upon a claim of a certain character fails to give bail within a specified time. 2dly. If upon such a claim a person is actually imprisoned for more than thirty days. 3dly. "If any person whose goods or estate are attached on mesne process in any civil action founded on such contract, for the sum of one hundred dollars or upwards, shall not, on or before the last day of the term of the court to which such process is returnable, dissolve the attachment in the manner hereinafter provided." Section 20 provides that any person whose goods or estate are attached may at any time before final judgment therein dissolve the attachment by giving bond. Section 21 provides for proceedings in the case of insolvent partners, and enacts that, with certain exceptions, such proceedings shall be conducted in like manner as if against one person alone. The above statute contained no provision authorizing proceedings in insolvency by or against corporations.

The St. of 1844, c. 178, § 9, added certain acts which should serve as the grounds of proceedings against individuals, and by § 12 a slight change was made in the time within which an attachment must be dissolved; in this respect amending St. 1838, c. 163, § 19. A further change in this last particular was made

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by St. 1851, c. 189, § 2; and in § 3 a wholly new enactment was made, as follows: "Whenever any person shall, by accident or mistake, have failed to dissolve an attachment made as aforesaid, he may forthwith apply, by petition, to the commissioner before whom proceedings against him are pending, for a stay of the said proceedings; and, after such notice to the petitioning creditor as such commissioner shall order, or without notice if the urgency of the case shall not allow notice to be given, the said proceedings may be stayed by an order of such commissioner until a hearing; and if, upon the hearing before such commissioner, such person shall prove to his satisfaction that he is in fact solvent, or that for any other cause such proceedings ought to be stayed, the said commissioner shall thereupon order the proceedings aforesaid to be suppressed and finally stayed."

The above statute in terms relates only to cases where proceedings in insolvency were actually instituted and pending while the attachment remained in force, and it provides that even in such case they might be stayed. This strongly implies that no such proceedings should be instituted after the attachment was dissolved, whether within the prescribed time or not. The statute was not intended to be punitive, but remedial, and where a remedy was given either to the creditor or to the debtor a liberal construction should be given in favor of the party whom the particular provision under consideration was designed to benefit. The principal object of the provision making a failure to dissolve an attachment within a specified time a ground of proceedings in insolvency was to prevent one creditor from obtaining a preference over the others in this way. If an attachment was not dissolved, the attaching creditor would be likely to obtain a lien which could not be removed. Therefore the statute allowed other creditors to file a petition in insolvency based on this failure, and the assignee in insolvency could take the property discharged of the attachment. *Bates* v. *Chapin*, 8 Cush. 99. This decision was in 1851, and was made after the St. of 1851, c. 189, went into effect; but no question arose under § 3 of the statute. The provision that the proceedings might be stayed if the debtor should prove his solvency, or that for any other cause they ought to be stayed, clearly shows that the

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Legislature wished to guard against oppression in the use of the power to proceed against a person in insolvency on the ground of his having failed to dissolve an attachment. Without speculating as to other causes which might be deemed sufficient to warrant or require a stay of proceedings, it is quite clear that the subsequent dissolution of the attachment might of itself be so considered.

If this construction is adopted, it follows by implication that a dissolution of an attachment at any time before the actual institution of proceedings in insolvency might be held to cut off this ground for such proceedings under the statutes cited. If upon the state of facts which existed the proceedings might be stayed, certainly upon those same facts it might be held that the proceedings ought not to have been instituted. The Legislature could not have intended to say that the same state of facts should serve as good ground for instituting proceedings, and should also serve as good ground for staying them.

By St. 1851, c. 327, for the first time, proceedings in insolvency by and against corporations were authorized. This statute was passed by the Legislature only four days after St. 1851, c. 189, but the time of its taking effect was postponed for a few months. The provisions for involuntary proceedings against corporations are found in § 17, and only two grounds are assigned, viz. the failure to dissolve an attachment and the making of a fraudulent conveyance. The provision as to attachments is as follows: "If any corporation whose goods or estate are attached on mesne process in any civil action founded on a contract for the sum of one hundred dollars or upwards, which is in its nature provable under this act, shall not, within fourteen days from the return day of the writ, if the term of the court to which the process is returnable shall so long continue, or on or before the last day of the said term if the same shall sooner end, dissolve the attachment in the manner hereinafter provided," a petition in insolvency may be filed against such corporation. There is a difference of detail between the right of an individual and of a corporation to dissolve an attachment under the statutes then existing. The individual might do it at any time before final judgment. St. 1838, c. 163, § 20. The corporation could only do it within fourteen days from the return day of the writ,

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or on or before the last day of the return term. St. 1851, c. 327, §§ 17, 18. Moreover, in the case of a corporation, the statute did not in express terms fix a limit to the time within which proceedings against it might be instituted.

A later provision in § 17 of St. 1851, c. 327, is as follows: "And whenever any corporation shall, by accident or mistake, have failed to dissolve an attachment made as aforesaid, it may forthwith, and at any time before the said commissioner shall have issued his warrant, as aforesaid, apply by petition to any justice of the Supreme Judicial Court for a stay of the said proceedings, and, after such notice to the petitioning creditor as such justice shall order, or without notice if the urgency of the case shall not allow notice to be given, the said proceedings may be stayed by an order of such justice until a hearing; and if, upon the hearing before such justice, the corporation shall prove to his satisfaction that it is in fact solvent, and if it shall not appear that such corporation has made any fraudulent conveyance of its property, the said justice shall thereupon order the proceedings aforesaid to be superseded and finally stayed."

This provision for a stay of proceedings against a corporation in case of its failure to dissolve an attachment differs somewhat in its details from the corresponding provision which is applicable to individuals; but the essential purpose of the statute is the same, namely, to prevent this act of insolvency from being used oppressively. In terms, it only relates to cases where proceedings in insolvency were actually pending before the attachment was dissolved. But the implication is equally clear that a dissolution of an attachment at any time before the actual filing of a petition in insolvency might be held to cut off the right to maintain such a petition on this ground.

Such was the condition of the statutes at the time of the adoption of the General Statutes in 1860.

Certain changes were then introduced. By Gen. Sts. c. 123, § 104, corporations, in respect to the right to dissolve attachments at any time before final judgment, were put on the same footing with individuals, the revising Commissioners saying in their notes, "There seems to be no good reason for the distinction in the two cases."

By Gen. Sts. c. 118, § 103, "If any person whose goods or

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estate are attached . . . has not within seven days from the return day of such process dissolved the attachment in the manner provided in chapter one hundred and twenty-three," a creditor's petition in insolvency may be filed against him within ninety days thereafter.

Section 105 is as follows: "When a person by accident or mistake has failed to dissolve an attachment within the time required by section one hundred and three, he may forthwith apply by petition to the judge before whom proceedings against him are pending, for a stay of the proceedings, and after such notice to the petitioning creditor as the judge orders, or without notice if the urgency of the case does not allow notice to be given, the proceedings may be stayed by an order of the judge until a hearing; and if upon the hearing he proves to the satisfaction of the judge that he is in fact solvent, or that for any other cause the proceedings ought to be stayed, the judge shall order the proceedings to be stayed and finally suppressed."

The provisions for involuntary proceedings against corporations are found in Gen. Sts. c. 118, § 122. "If a corporation whose goods or estate are attached . . . does not within fourteen days from the return day of the writ, if the term of the court to which the process is returnable so long continues, or on or before the last day of the term if the same sooner ends, dissolve the attachment in the manner provided in chapter one hundred and twenty-three," a creditor's petition in insolvency may be filed against it, no limitation for the time of such filing being fixed in express terms.

The provision for granting a stay of proceedings when by accident or mistake a corporation has failed to dissolve an attachment, contained in St. 1851, c. 327, § 17, is not in terms repeated in the General Statutes, nor is it contained in the report of the revising Commissioners. The Commissioners make no mention of the omission, and do not express any intention to exclude corporations from the benefit of such a provision. On the other hand, after referring to the somewhat confused state of the statutory provisions, as then existing, they say: "In attempting to reduce this chaos to form and order within a reasonable space, the Commissioners have been obliged to make extensive changes in the phraseology. . . . The only changes

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in the existing rules which are deemed of importance are noted below." No mention being made of the omission of the provisions for staying proceedings in the case of corporations, it seems clear from the above statement that the Commissioners did not intend to provide for changing the law in this respect, and it is probable that the omission was by accident, or it may have been thought that the provisions of § 105 would extend to corporations. The report of the legislative committee which acted upon the report of the Commissioners makes no reference to this matter. Neither of these considerations would be decisive to show that no change in the law was made by the true construction of the statutes as enacted; but prior to the actual enactment of the General Statutes, we find nothing to show that such change in this particular was contemplated.

There may be a difficulty in applying the language of Gen. Sts. c. 118, § 105, to corporations. Whether this difficulty is insuperable or not, we need not inquire. But we are of the opinion that the unexplained omission to provide in express terms for staying proceedings which have actually been instituted in case of a failure to dissolve an attachment by accident or mistake did not have the effect to render a corporation liable to such proceedings after a dissolution of the attachment, even though such dissolution was not within the prescribed time.

The foregoing provisions of the General Statutes, with certain amendments which are not material here, are embodied in the Pub. Sts. c. 157, §§ 112, 115, 136; c. 161, § 122; and in respect to staying proceedings in insolvency which have been commenced against a corporation, no change from the General Statutes was made in the Public Statutes.

In view of this summary of the statutes, we are of opinion that the Legislature intended to allow the filing of a petition in insolvency against a person or a corporation on this ground, provided the attachment remains in force at the time when the creditor's petition is filed, and not otherwise.

The St. of 1894, c. 139, authorizing a stay of proceedings in insolvency against persons and corporations in certain cases, was passed too late to affect the present case. This statute is broader in its scope than those we have considered, but it may be observed

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that, according to its express terms, it relates only to staying proceedings which have actually been instituted, and it does not in terms say that no proceedings on the ground of a failure to dissolve an attachment within the prescribed time shall be instituted after the actual dissolution of such attachment.

There seems to be no doubt that the attachments in the present case were effectually dissolved before the filing of the creditor's petition. The attorneys had authority to release them. *Moulton* v. *Barker*, 115 Mass. 36. The papers signed by them respectively were delivered to the debtor's attorney for the purpose of dissolving the attachments, and had the effect to dissolve them at once, and before the entries were made upon the record.* *Benson* v. *Carr*, 73 Maine, 76. Attachments may be dissolved in different ways, and in none of them is an entry upon the record essential. See *Freeman* v. *Creech*, 112 Mass. 180; Pub. Sts. c. 161, §§ 52, 54, 55; c. 157, § 46; c. 161, §§ 122, 126; Sts. 1884, c. 236; 1889, c. 406.

In the opinion of a majority of the court, the entry must be,

Petition dismissed.

KNOWLTON, J. By Pub. Sts. c. 157, § 112, it is provided that "if a person arrested on mesne process in a civil action for the sum of one hundred dollars or upwards, founded upon a demand in its nature provable against the estate of an insolvent debtor, has not given bail therein on or before the return day of such process, or has been actually imprisoned thereon for more than thirty days, or if a person whose goods or estate are attached on mesne process in such action founded upon such contract has not before the return day of such process dissolved the attachment in the manner provided by law, . . . or, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudu-

* These papers, except that the date and the name of the action differed in each, were in the following form, and were signed by the petitioners' attorneys:

"To the Register of Deeds, Worcester District: Sir, — The attachment of the real estate and personal property of Jamesville Manufacturing Company in said District, made on the 29th day of July, 1893, in an action commenced in the Superior Court by J. F. & C. G. Warren, Plaintiff, is hereby dissolved, and you will please make a note to that effect on the record of attachments in your office."

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lently stopped payment or has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," or has committed any one of several other specified acts of insolvency, "any of his creditors whose claims provable against his estate amount to one hundred dollars may, within ninety days thereafter, . . . apply by petition to the judge" of insolvency, and cause him to be adjudged an insolvent debtor. In § 136 of the same chapter there are similar, although slightly different, provisions for involuntary proceedings against corporations. The opinion of the majority of the court denies the right of creditors to proceed under either of these sections, if a debtor has failed to dissolve an attachment within the time prescribed, unless it also appears that he has failed to dissolve it afterward, and has continued his failure up to the time of filing the petition against him. It seems to me that this opinion contradicts the plain language of each of these sections, which were originally enacted at different times in somewhat different terms.

It was a fundamental principle of English law, that a plain act of bankruptcy could not be purged. *Hopkins* v. *Ellis*, 1 Salk. 110. *Colkett* v. *Freeman*, 2 T. R. 59. Robson, Bankruptcy, (7th ed.) 133. It seems to me that our American statutes have generally adopted this principle. It has been so held under the United States bankruptcy acts, and it must be so held under the statute of this Commonwealth, unless its express provisions are set aside.

If a debtor has "suspended and not resumed payment of his commercial paper within a period of fourteen days," or if he has been arrested on mesne process and has not given bail before the return day of the process, or if he has been imprisoned on such process for more than thirty days, I can see no good reason why it must not be shown that his failure to resume payment, or to give bail, or to get released from imprisonment, has continued up to the time of filing the petition against him, as well as his failure to dissolve an attachment in a similar case. In *Mendenhall* v. *Carter*, 7 Nat. Bankr. Reg. 320, 322, it was said of suspension of payment of commercial paper, that to constitute this act of bankruptcy the debtor "must fail to resume payment within a period of fourteen days," and that, "if payment should

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be made in twenty days after suspension, this will not do away with the act of bankruptcy." In each of the following cases it is assumed that the right of creditors to proceed becomes complete at the expiration of fourteen days, if there has been no resumption of payment within that time. *In re Weikert*, 3 Nat. Bankr. Reg. 27. *In re Thompson*, 3 Nat. Bankr. Reg. 185. *Hardy* v. *Bininger*, 4 Nat. Bankr. Reg. 262. *In re McNaughton*, 8 Nat. Bankr. Reg. 44. *In re Clemens*, 8 Nat. Bankr. Reg. 279. *In re Wilson*, 8 Nat. Bankr. Reg. 396. In *In re Cohn*, 7 Nat. Bankr. Reg. 31, it is assumed that a similar rule applies if one fails to get relieved from arrest within the time named in the statute. In all the decisions of the many courts of the United States that have administered the bankruptcy law I have been unable to find one that suggests a different rule.

There are important reasons why one who has committed an act of insolvency or of bankruptcy by an omission to meet a liability within the time required by the statute should be liable to proceedings, even if he attempts to correct the error by meeting the liability afterwards. In cases where the debtor desires the aid of the insolvency court, provisions for involuntary proceedings are of no consequence. But where he desires to avoid an honest and equitable settlement, or to go on with his business when the interests of his creditors require that he should stop it, it is of great importance that his creditors should have a right to proceed against him. Often the amount involved in an act of insolvency is small, but the statute attaches significance to the act as an indication of the debtor's condition or intention. Frequently a debtor will manage to avoid or conceal acts of insolvency for the purpose of preventing proceedings against him until he is unable to pay more than a small percentage of his debts. If, having once committed an act of insolvency, he could purge himself of it by giving a bond to dissolve an attachment, or giving bail, or procuring payment of a small debt to which the act related, his creditors might be remediless while he was wasting his estate. So the statute gives creditors an absolute right to commence proceedings on commission of either of the specified acts. But inasmuch as attachments of some kinds of property may be made by an entry of record without interfering with the possession or use of it, and such attachments often are not dissolved at once,

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it seems to have been thought that a way should be provided for obtaining relief from the effects of an act of insolvency of this kind without settling the affairs of the debtor in the Court of Insolvency. Accordingly, St. 1851, c. 189, § 3, was passed, (Pub. Sts. c. 157, § 115,) which gives to a person who "by accident or mistake, or other sufficient cause, has failed to dissolve an attachment within the time required by section one hundred and twelve," the right to apply to the judge and have the proceedings stayed and dismissed if he proves "that he is in fact solvent, or that for any other cause the proceedings ought to be stayed." By St. 1851, c. 327, § 17, in case of like failure to dissolve an attachment by a corporation, the corporation might apply to a justice of the Supreme Judicial Court, and upon similar proof have the proceedings finally stayed. This provision in regard to persons seems to me to assume that the right of the creditors becomes absolute, and that this kind of relief may be needed on failure "to dissolve an attachment within the time required by section one hundred and twelve," which time is "before the return day of such process." I can find nothing to show that it limits the right to relief to cases where there has been not only a failure to dissolve it within the time stated in the statute, but also a failure to dissolve it for an additional time up to the commencement of proceedings in insolvency. The relief granted is a stay of proceedings, and it cannot be granted until proceedings are commenced, because if no proceedings are commenced no relief is needed. But to my mind there is a plain implication that the relief may be needed, and the proceedings may be commenced if the contingency mentioned in the statute happens, without regard to what may be done by the debtor afterwards. The same considerations apply to the statute above cited in regard to corporations.

This relief is given by the statute only when the debtor proves at the hearing that he is in fact solvent, or that for some other cause the proceedings ought to be stayed. Under the opinion of the majority of the court, the debtor may be guilty of an act which is stated in the statute to be an act of insolvency, but he can afterwards defeat the proceedings against him without reference to the question whether he is solvent, or whether for any

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cause the proceedings ought to be defeated. This seems to me in conflict with the intent and spirit of the statute, as well as with its letter.

The St. 1894, c. 139, extends this relief to a person or corporation that "has committed any act of insolvency from which he or it should be equitably relieved." I think the term "act of insolvency" in the statute means any of the acts specified in the statute as a ground for the commencement of proceedings against a debtor, and that this statute makes no distinction between failure to dissolve an attachment and failure to give bail, or to be discharged from arrest, or failure to resume payment of commercial paper, within the time prescribed in the section. Considered in reference to this last statute, the opinion of the majority allows one who has failed to dissolve an attachment within the time specified to obtain immunity from proceedings by his subsequent act, without regard to the equitable considerations that are made the foundation for relief under this chapter.

In this view of the law, a creditor never has any but a contingent right to proceed against a debtor under this clause of the statute. He may begin to prepare his petition and put his proofs in form, and the debtor, though deeply insolvent, may afterward take away the foundation of his case by dissolving the attachment. In preparing his petition, if he alleges all that the statute states to be necessary it is not enough, for he must prove more. If he goes further, and alleges that the debtor has not at any later time dissolved the attachment, and makes affidavit to the statement as the law requires, it may be true when he makes the affidavit, but untrue an hour afterwards when he files his petition. It seems to me that it would require very plain language to justify a construction of the statute which would never give the creditor an absolute right to proceed, but only a contingent right up to the very moment when his petition is filed.

In many cases it has been assumed by this court in its opinion, as well as by counsel in their proceedings, that the right of the creditor to proceed under this clause of the statute is absolute as soon as the prescribed time has expired without a dissolution of the attachment, and that it is not necessary to allege or prove that the debtor's default has continued after the expiration of

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that time. *Kimball* v. *Morris*, 2 Met. 573, 578. *Dennis* v. *Sayles*, 11 Met. 233. *Thompson* v. *Snow*, 4 Cush. 121, 126. *Bates* v. *Chapin*, 8 Cush. 99, 101. *Wheeler* v. *Bacon*, 4 Gray, 550. *O'Neil* v. *Glover*, 5 Gray, 144, 157. *Gross* v. *Potter*, 15 Gray, 556. I have failed to find anywhere an intimation of a contrary doctrine.

There are indications that § 17 of St. 1851, c. 327, was left out of the General Statutes inadvertently, and perhaps that fact might properly affect the decision of this case on grounds other than those relied upon in the opinion. But the error, if it was an error, has been corrected by St. 1894, c. 139, and no other case can ever be affected by it.

The doctrine asserted in the opinion of the majority seems to me wrong, because in my view it is contrary to the decisions of the English courts and of the Federal courts in this country; because it sets aside the express provisions of several sections of the statutes of this Commonwealth enacted at different times, and the plain implication of other sections; because, in giving a different kind of interpretation to the language defining one act of insolvency from that given to similar language defining other acts of insolvency, it introduces a strange anomaly into our law; because it is at variance with the construction of the statute assumed to be correct in several decisions of this court, and in the opinions and practice of courts generally; and because it substitutes a law bad in its practical working for that which, under a different construction, would be easily administered and would protect the rights of everybody.

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DANIEL W. SHEA *vs.* DAVID B. GURNEY & another.

Plymouth. October 16, 1894. — March 1, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Licensee and Volunteer — Action.

A boy fourteen years old went upon premises used as a saw-house and box factory, solely for his own amusement, and, while assisting a workman who was sawing slabs with a circular saw, the upper part of which was exposed, by taking, in accordance with the latter's directions, the pieces of wood from the saw as they were cut and throwing them upon the floor or into a wagon, was injured by coming in contact with the saw in reaching across it to get a piece of wood. He had been accustomed to visit the premises, and to amuse himself by riding in the wagons and by assisting the workmen, in the presence of the owner, who had himself on one or two occasions directed him to load some boxes; and shortly before the accident happened the owner saw him helping to load slabs into a wagon to be taken to the saw-house. *Held*, in an action against the owner for his injury, that he was only a licensee and volunteer, and the defendant owed him no duty except to abstain from injuring him wantonly; and that the action could not be maintained.

TORT, against David B. Gurney and Charles P. Slack, copartners as C. P. Slack and Company, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendants. Trial in the Superior Court, before *Bishop*, J., who allowed a bill of exceptions, in substance as follows.

The defendants at the time of the injuries complained of, and for some time before, were the proprietors of certain mill property in Whitman, where all the parties resided. One of the buildings was a large wooden box factory, on the south side of which and adjoining it was a small house, called a saw-house, one story in height. Entrance was had to this saw-house by two doors, one on the south, the other on the west side, each about five feet wide. In this house was a bench or framed structure standing about three and a half feet from the floor, on the east end of which revolved a circular saw two feet in diameter, the lower half, up to within two inches of the centre or arbor, being covered on the outside by slabs or thin boards, and all above being exposed. In front of this bench was a trough or "rocker," in which the wood to be sawed was placed. The

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operator at the saw, after placing the wood in position, pushed the rocker from him, bringing the wood extended over the right end of it against the saw, thus severing the stick. This rocker was held in position and prevented from falling to the floor by a chain attached to the lower half of it and to the bench.

The plaintiff, when injured, was engaged in taking the pieces of the wood from the saw as they were cut, and throwing them to the floor, or into a wagon standing at the door; and the injury was caused by his wrist coming in contact with the saw while attempting to take the end of a stick of wood from the rocker after the last cut in the stick had been made.

The plaintiff testified that he was fourteen years old, and attended school in Whitman; that he lived within a stone's throw of the defendants' mill property; that on September 9, 1893, which was Saturday, he went to the mill-yard in the afternoon with another boy named Bagley; that they jumped upon a team driven by William Arsenal, an employee of the defendants, helped him to load some slabs, and rode with him while delivering them; that they rode back again and helped to load some edgings; that before the edgings were loaded, the defendant Slack came out of the factory and gave orders to Arsenal where to deliver them; that the plaintiff was on the wagon at the time, and Slack was about fifteen feet away; that the edgings were delivered, and they returned and loaded up again with slabs, both boys helping; and that the team was driven to the saw-house at the west door, and the slabs were thrown into that door where they could be reached, and the wagon was then placed at the south door of the saw-house.

The plaintiff further testified as follows: "We were on the wagon, and Arsenal commenced sawing slabs; after he had sawed and got a pile on the ground, he motioned to me to pick up the slabs and throw them into the wagon. I jumped off the wagon and began to load the slabs, Bagley helping. After I took the pile of slabs off the floor, I commenced taking them off the stand (rocker) that was pushed against the saw to saw the slabs. After Arsenal put a slab on, when it came to the last piece, he left it on the stand for me to take off. As I was reaching for it, my hand came in contact with the saw. I had been working at the saw about fifteen or twenty minutes. The

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other pieces would extend out a little from the saw. I took hold of them when they were sawed off and threw them into the wagon. The end piece would be left on the stand that was pushed up against the saw. I reached for the piece that was left on the stand. When Arsenal wanted to saw off a piece he pulled the rocker back, and when he started to saw again he would push the rocker up. I put my hand over to reach the last piece in front of the saw."

The plaintiff also testified that he had been in and about the mill frequently before this, and saw Slack at that time more than once; that he was helping the men round there nearly all day; that there were other boys there; that he had been there frequently in the summer vacation, a dozen or fifteen times, and saw Slack almost every time; that he had worked in the saw-house two or three times before, within two months, taking wood from the rocker; that he had seen Slack each time while working in the saw-house, at the door, and he said nothing to him; that he had worked with Slack loading boxes a dozen times that summer; that he did this for a ride; and that there were no notices about the place.

Upon cross-examination, the plaintiff testified that one Randall, who was in the employ of the defendants, never ordered him off the premises; that Slack must have seen him at work when he saw Slack; and that on the day of the accident he went upon the premises for the purpose of getting a ride on a wagon.

The plaintiff continued his testimony as follows: "Slack has seen me about the saw almost every time I was there, and taking pieces away from it; he has stood at the door while I was there; never knew Slack to order the boys out of the yard. I had seen this saw run a good many times; didn't ever think whether it would hurt if the hand was put against it; had seen it cut wood, slabs, and hard wood; knew it would cut off a stick in an instant; knew it ran pretty fast; had seen it started and stopped. I thought you would have to push the wood up against the saw in order to have it cut off; thought you would n't be likely to put your hand against it; knew if you touched it while running, it would cut you; thought if you put your hand out into the rocker trough to take the piece out, you would n't get

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your hand against the saw; thought I could keep away from the saw easy enough; was not in a hurry when I reached for it; did n't do it any more carelessly than I did before; I reached for the last piece with both hands. I have seen Gurney there once."

The plaintiff also illustrated to the jury his position with reference to the saw at the time of the injury, and showed that he was standing side of the saw, facing towards the rocker, so that he had to reach forward and diagonally across the saw in order to reach the piece of wood in the rocker.

Edward Randall testified as follows: "I worked for the defendants from February to August, 1893, and was about the defendants' premises up to the time of the accident; knew the plaintiff, and saw him two or three times each week in July and August; he has worked with me loading boxes from the mill; have seen him in the saw-house throwing wood into a wagon; took wood from the saw; has done this while I worked at the saw, in July or August; have seen Slack in the yard when the plaintiff was working about there, and when at work in the saw-house, more than once; twice or three times Slack was ten or twelve feet from the saw-house; Slack has been about there when the plaintiff was working loading boxes; have heard him say to the plaintiff, 'Come, Dannie, hustle these boxes right out.' The plaintiff has ridden with me when Slack was there."

On cross-examination the witness testified that, before the accident, Slack had told him and the other drivers in his employ that he would discharge the first man whom he saw having a boy on his team; that the witness repeated this to the plaintiff; that he had heard Slack tell boys to keep off the premises, but could not say whether the plaintiff was one of the boys; and that he knew Slack had seen the plaintiff in the saw-house. Several witnesses testified that they had seen the plaintiff at work in the saw-house, and also loading boxes in the yard, Slack being present on each occasion.

The judge ruled, at the defendants' request, that the action could not be maintained; and directed the jury to return a verdict for the defendants. The plaintiff alleged exceptions.

L. E. Chamberlain, (*H. Kingman* with him,) for the plaintiff.

R. O. Harris, (*C. H. Edson* with him,) for the defendants.

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MORTON, J. The plaintiff was not in the employ of the defendants. He was not induced nor invited by them to enter their premises. He did not go there upon any matter of mutual interest to him or them, or upon any matter of business. He went there solely for his own amusement. At different times before the accident he had assisted workmen, including the one whom he was helping when the injury occurred, under such circumstances that the jury would have been warranted in finding that he was doing it with the knowledge of one or both of the defendants. Once or twice, as the testimony tended to show, when about the premises, he had been directed by Slack to load some boxes. And in the same afternoon, shortly before the accident happened, the testimony tended to show that Slack saw the plaintiff helping to load slabs into a wagon to be taken to the saw-house.

But as between the plaintiff and the defendants, notwithstanding these circumstances, he was at the most only a licensee and volunteer, visiting the premises to amuse himself by riding in the teams and by assisting the men. And as such the defendants owed him no duty except to abstain from injuring him by active misconduct on their part. *Zoebisch* v. *Tarbell*, 10 Allen, 385, 386. *Severy* v. *Nickerson*, 120 Mass. 306. *Johnson* v. *Boston & Maine Railroad*, 125 Mass. 75. *Galligan* v. *Metacomet Manuf. Co.* 143 Mass. 527. *Metcalfe* v. *Cunard Steamship Co.* 147 Mass. 66. *Reardon* v. *Thompson*, 149 Mass. 267. *Daniels* v. *New York & New England Railroad*, 154 Mass. 349. *Billows* v. *Moore*, 162 Mass. 42.

We do not mean to intimate that the plaintiff was in the exercise of due care, even if he were to be regarded as the servant of the defendants.

The direction by the workman, Arsenal, does not help the plaintiff. *Flower* v. *Pennsylvania Railroad*, 69 Penn. St. 210. *New Orleans, Jackson, & Great Northern Railroad* v. *Harrison*, 48 Miss. 112. *Howard* v. *Hood*, 155 Mass. 391.

Exceptions overruled.

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JOHN C. McINTYRE *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. November 20, 1894. — March 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ

Personal Injuries — Due Care — Unsafe Appliance — Foreign Law — Negligence — Evidence.

The law of a sister State is presumed to be the same as our own, when not shown to be different.

In an action by a brakeman for injuries occasioned by the breaking of a defective stake used to hold a load of ties upon a platform car, evidence which shows merely that his employer supplied lumber enough to be sawed for the stakes, and good lumber enough and men enough to prepare them, and that the defective stake was among those so prepared, justifies a finding that the defective stake was there through the negligence of the men whose duty it was to prepare the stakes, and for that negligence at least the employer was liable.

TORT, for personal injuries occasioned to the plaintiff in the State of New Hampshire, while in the defendant's employ as brakeman, by the breaking of a stake inserted in the defendant's freight car.

Trial in the Superior Court, before *Richardson*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, the material portions of which appear in the opinion.

B. Hall, for the plaintiff.

S. Lincoln & T. Hunt, for the defendant.

BARKER, J. There was evidence from which the jury might find that the plaintiff, while in the discharge of duty and using due care, was injured by the breaking of a weak, knotty, worm-eaten, and rotten stake, which was unfit for the use to which it had been put, of holding a load of railroad ties upon a platform car; and from the description of the stake it would be competent for a jury to find that the putting of such a stake to such a use was an act of negligence. The use of the stake as a means of facilitating the passage of a brakeman from car to car of the train made it the duty of the defendant to use due care to see that it was suitable for that purpose.* *Coates* v. *Boston & Maine*

* The plaintiff testified that he was ordered by the conductor to go forward to set off certain cars as they were approaching a junction; that in

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Railroad, 153 Mass. 297. A section-master of the defendant road, who was an inspector of ties, testified that the stakes belonged to the defendant, and were placed in position by men in its employment; that the defendant bought the lumber of which the stakes were made, and that it was sawed and the cars were staked under his direction; that the defendant supplied lumber enough, and good lumber enough, for the purposes of stakes, and men enough to prepare them, and that sometimes, but not often, stakes were returned with a car, but usually they were lost. The accident happened in New Hampshire, and three decisions of the Supreme Court of that State were in evidence as showing the law of New Hampshire. These were *Fifield* v. *Northern Railroad*, 42 N. H. 225; *Hanley* v. *Grand Trunk Railway*, 62 N. H. 274; and *Nash* v. *Nashua Iron & Steel Co.* 62 N. H. 406.

These decisions do not show that the doctrine, that intrusting to suitable servants the duty of furnishing suitable appliances for the work does not discharge an employer from the consequences of negligence on the part of such servants in providing safe and suitable appliances, is not the law of New Hampshire. That question was not raised or decided in the decisions which were in evidence, and we must assume that the law of New Hampshire upon the question is the same as our own.

The case is not one where an implement designed for repeated use has been weakened and made unfit for further service by such use; it is rather the case of the furnishing of an implement never fit for use, and evidently unfit. Such a stake could not, without negligence, have been placed where stakes were

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order to set off these cars it was necessary to disconnect certain box cars from the cars carrying ties. He said: "I was called to go over the train, and in so doing I started down over the two box cars, down the side ladder, and as I went to step across from the box car upon the flat car, I reached my right hand over, taking hold of the stake, putting my right foot under the edge of the tie, and as I let go my left hand to pull myself over the stake broke right off, probably six or eight inches above the stake iron, and I fell to the ground." He also testified that the only safe way for him to cross from the box car to the flat car was by taking hold of the stake, and that there was nothing else on the flat car for him to take hold of; and that the stakes were for the purpose of holding on a load and assisting a man over the train.

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kept to be used for the purpose to which this was put. We need not inquire whether, if it had been taken from a number of sound and suitable stakes provided for that purpose by a workman whose duty it was to equip the car, the careless taking of this stake would have been negligence of a fellow workman the risk of which the plaintiff must stand, or whether negligence in equipping the car with stakes is something for which the defendant is responsible, whether it intrust the work to one person or another. See *Bushby* v. *New York, Lake Erie, & Western Railroad*, 107 N. Y. 374.

The defendant's evidence falls short of showing that there was a sufficient supply of sound and suitable stakes. It shows only that the defendant supplied lumber enough to be sawed, and good lumber enough for the purpose, and men enough to prepare the stakes. That this stake was among those so prepared would justify a finding that it was there through the negligence of the men whose duty it was to prepare them, and for that negligence at least the defendant was answerable.

Exceptions sustained.

DOVER STAMPING COMPANY *vs.* JABEZ B. FELLOWS & another.

Suffolk. December 6, 1894. — March 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Trademark — "Dover" — Patent — Trade Name — Statute — Unfair Competition — Equity.

A word which might become a valid trademark when applied to an unpatented article may not be so when applied to a patented article.

Where one who has a patented article gives to it and puts upon it a name, and calls it by that name and by no other, and it becomes known to the trade and to the public exclusively by such name, then, as a general rule, the right to the exclusive use of the name ceases with the termination of the exclusive right to make and sell the article.

A person who has used a name as descriptive of a patented article, but in which he has no trademark, is not entitled, after the expiration of the patent, to protection under Pub. Sts. c. 76, § 1, providing that trademarks are not to be used without the consent of the owner.

If a person has used a name as descriptive of a patented article, and not as a trade-

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mark, he cannot maintain a bill in equity, after the expiration of the patent, to restrain the use of the name by another person upon an article made by the latter, on the ground that he is injuring the plaintiff by unfair competition, merely by showing that the defendant is making and selling an article similar in kind and under the same name as that of the plaintiff.

BILL IN EQUITY, filed May 11, 1891, to restrain the use of the name "Dover" as applied to egg-beaters. Hearing before *Holmes*, J., who, at the request of both parties, reserved the case for the consideration of the full court, such decree to be entered as law and justice might require. The facts appear in the opinion.

T. W. Clarke, for the plaintiff.

E. S. Beach, for the defendants.

ALLEN, J. This case comes up on a report of the evidence, without any findings of the facts. We have therefore in the first place to determine and state the material facts shown by the evidence, and then to determine the rules of law applicable to the facts.

In 1857 a partnership or company was established under the name of the Dover Stamping Company, which in 1871 was organized as a corporation under the laws of this Commonwealth, having its usual place of business in Boston and its factory in Cambridge. This company, both before and after its organization as a corporation, may for convenience be called the plaintiff. It manufactured and dealt in kitchen furnishing goods and tin ware. On May 31, 1870, one Turner Williams obtained letters patent for an improved egg-beater, the essential principle of which consisted in having two interworking or interlacing floats or beaters, revolving in opposite directions on separate centres, and occupying the same working space. The plaintiff dealt in egg-beaters of different kinds, and in 1870 obtained control of the Williams patent, and as early as 1872 became the owner of it. In 1870 the plaintiff contracted with the Lamb Knitting Machine Manufacturing Company for the manufacture of egg-beaters under the Williams patent, and also of other kinds of egg-beaters. To the egg-beaters under the Williams patent the plaintiff gave the name of "Dover," and on October 31, 1870, directed the Lamb Company to put on the wheel of the egg-beaters the words and figures, "Dover Egg

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Beater, Pat'd May 31st, 1870." This was done. On May 6, 1873, one Ethan Hadley obtained letters patent for an improvement in egg-beaters. In his specification he said, "My invention relates to an improvement in what is known as the Dover egg-beater," and in his claim he spoke of his invention as "an improvement on the Dover egg-beater." This invention was assigned to the plaintiff. The Lamb Company continued to be the exclusive manufacturer of the Dover egg-beaters for the plaintiff under these patents until the expiration of the last patent in 1890. These egg-beaters were made in three sizes. The ordinary size, adapted for family use, constituted ninety-eight or ninety-nine per cent of the whole manufacture. The largest size was sometimes called the "mammoth," or "hotel" size; of these perhaps one thousand were made in all. The second largest size was called the "extra family size," and perhaps ten times as many of these were made as of the hotel size. The whole number of Dover egg-beaters of all sizes made for the plaintiff by the Lamb Company was about four million. These egg-beaters were known by the trade and by the public as "Dover" egg-beaters. They were spoken of and bought and sold under that name, and they had no other name. The name "Dover" was used to signify and indicate this article; and there was no other usual short way in which to describe it. "Dover" was the name by which they were universally known. This name signified the above mentioned combination of floats or beaters, propelled by a wheel and handle. The improvement patented by Hadley, and various unpatented improvements which were made from time to time, were not essential features of the machine, but were rather changes and improvements in mechanical details, not affecting the principle or the general mode of construction. Some stress has been laid on these changes in the argument for the plaintiff, but they appear to us insufficient to show that the word "Dover" meant to dealers or to the public anything else than egg-beaters of that general construction and appearance. From the outset the general construction and appearance remained about the same, only there were some changes in mechanical details which were not distinguishing characteristics of the article.

Since 1875, various other articles manufactured or sold by the

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plaintiff have been named or called "Dover," as, for instance, Dover can-spouts, Dover tea-kettles, Dover coal-hods, etc. The plaintiff's machines were all marked "Dover Egg Beater," with dates of patents, in which last particular there was some change after the Hadley patent was obtained. The defendants' machines which are complained of were marked simply "Dover," with dates of other patents. The defendants' mode of packing the goods had been in use before the Williams patent was obtained.

The plaintiff contends, in the first place, that the word "Dover" as applied to egg-beaters is a trademark, and that it is entitled to be protected in the exclusive use of that word. The defendants deny that the plaintiff could acquire a valid trademark in the word "Dover" under any circumstances; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460; Sebastian, Trademarks, 82, and cases cited; but it is enough for us to inquire whether the plaintiff has done so under the particular circumstances of this case.

A word which might become a valid trademark when applied to an unpatented article may not be so when applied to an article which has the protection of letters patent. In the latter case the letters patent indicate the ownership and origin of the article, and it is more readily to be inferred that the word is used as a name merely to identify the article. Usually the protection given by a patent is far greater, though of less duration in time, than that obtained by the use of a trademark; because if an article is patented nobody but the owner of the patent can without his consent make or sell anything embodying the same principles or elements, while a trademark only secures one in the use of the name or emblem adopted by him and applied to the article. Sebastian, Trademarks, 15. One may choose to rely on the name alone; and if so, he may establish or create a trademark which will be permanent. But if he seeks and obtains the protection afforded by a patent, he is bound to yield up his monopoly with all that belongs to it at the end of the term, and the right to the exclusive use of the name given to his goods, which might otherwise have become a trademark, will ordinarily fall with the patent itself. It is sometimes said that the granting of a patent is a contract with two sides to it;

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that the government grants an exclusive use for a term of years, and the patentee agrees to surrender that use fully and freely for the general benefit of the public at the end of that term; and that this contract is to be liberally construed in favor of the patentee during the term, and in like manner liberally construed in favor of the public after the term has expired. Robinson, Patents, §§ 40, 44. This at any rate describes with substantial accuracy the resulting rights of the parties. After the expiration of a patent, the public is entitled to make and use the patented article, free from restrictions; and this right carries with it whatever is necessary for its full enjoyment.

In *Cheavin* v. *Walker*, 5 Ch. D. 850, 862, it was said by Jessel, M. R.: "Protection only extends to the time allowed by the statute for the patent, and if the court were afterwards to protect the use of the word as a trademark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trademark." And in the same case, James, L. J. said: "It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trademark. Whatever is mere description is open to all the world." In *In re Palmer's Trademark*, 24 Ch. D. 504, 521, Lindley, L. J. said: "I do not mean to say that a manufacturer of a patented article cannot have a trademark not descriptive of the patented article so as to be entitled to the exclusive use of that mark after the patent has expired; for instance, if he impressed on the patented articles a griffin, or some other device; but if his only trademark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers." And in *In re Leonard & Ellis's Trademark*, 26 Ch. D. 288, 303, 304, after an elaborate exposition by Lord Chancellor Selborne, it was said by Cotton, L. J.: "If a man has a patent, and during the term of his patent is the only maker of an article to which he gives a particular name, which name during the continuance of the patent comes to be merely a description of the article, he cannot, in my opinion, after his patent is gone, and the making

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of the article is free and open to all the world, claim the name as his trademark."

In the present case, it is not necessary for us to go so far as to say that where there is a patent there can be no trademark, especially where some special device or symbol is added to the general name of the article manufactured. But where one who has a patented article gives to it and puts upon it a name, and calls it by that name and by no other, and it becomes known to the trade and to the public exclusively by the name so given to it by the patentee or person controlling the patent, then certainly it may be said that, as a general rule, the right to the exclusive use of the name ceases with the termination of the exclusive right to make and sell the thing. This is shown by numerous decisions in England and in this country. *Linoleum Manuf. Co.* v. *Nairn*, 7 Ch. D. 834. *Wheeler & Wilson Manuf. Co.* v. *Shakespear*, 39 L. J. Ch. 36. *Young* v. *Macrae*, 9 Jur. (N. S.) 322. *In re Palmer's Trademark*, 24 Ch. D. 504, 517, 520, 521. *In re Leonard & Ellis's Trademark*, 26 Ch. D. 288. *Singer Manuf. Co.* v. *Stanage*, 6 Fed. Rep. 279. *Singer Manuf. Co.* v. *Riley*, 11 Fed. Rep. 706. *Singer Manuf. Co.* v. *Larsen*, 8 Biss. 151. *Singer Manuf. Co.* v. *June Manuf. Co.* 41 Fed Rep. 208. *Brill* v. *Singer Manuf. Co.* 41 Ohio St. 127. *Tucker Manuf. Co.* v. *Boyington*, 9 U. S. Pat. Gaz. 455. *In re Consolidated Fruit Jar Co.* 14 U. S. Pat. Gaz. 269. *Lorillard* v. *Pride*, 28 Fed. Rep. 434. *Gally* v. *Colt's Patent Fire Arms Manuf. Co.* 30 Fed. Rep. 118. *Coats* v. *Merrick Thread Co.* 36 Fed. Rep. 324. *Hiram Holt Co.* v. *Wadsworth*, 41 Fed. Rep. 34. The inclination of courts to treat a name so used as merely the name of the goods, and not as denoting any connection between them and the trader, is mentioned by the text-writers. Kerly, Trademarks, 40–42, 201, 202, 405. Sebastian, Trademarks, 59–61. See also Browne, Trademarks, §§ 220 *a*, 221.

If therefore we should assume that there may be a double use of a word like "Dover," and that it may be used both as the name of the patented article and as a trademark, then it would be necessary to see if in this case there was sufficient evidence to show that the plaintiff so used it as to import a trademark as well as the name of the patented article, and also that the defendants have used it in a like double sense. Since ordinarily

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the exclusive right to use the name ceases with the expiration of the patent, there must at least be something to show some special and distinguishing use, by which it can be seen and known that the word is not used merely as the name of a thing, but to import the additional feature of a trademark. *In re Leonard & Ellis's Trademark*, 26 Ch. D. 288, 296, 298. There is nothing to show that the plaintiff ever had this distinction in mind, or used the word in any other manner than merely as the name given to the egg-beaters. Nor, on the other hand, is there anything to show that the defendants, since the expiration of the patent, have used the word in any other sense than to call the machine by its name. This they have a right to do; and to entitle the plaintiff to an injunction it must be shown that the defendants have used the word in a further sense, so as to violate the plaintiff's right of trademark, while using the word "Dover" as the name of the machine, as they lawfully may do; and any injunction which might be granted would have to be so limited as not to prohibit the defendants from calling the egg-beaters by their name. The distinction is fine, perhaps too fine for practical application. In this case we are not satisfied, on the evidence, that the plaintiff has any trademark in the name "Dover." A mere name is often held to be simply descriptive of the article which is called and known by it and by no other name, and it may be assignable to others, even though it is the name of the inventor or original manufacturer or dealer himself. *Thomson* v. *Winchester*, 19 Pick. 214. *Gilman* v. *Hunnewell*, 122 Mass. 139. *Russia Cement Co.* v. *LePage*, 147 Mass. 206, and cases there cited. *Noera* v. *Williams Manuf. Co.* 158 Mass. 110. See also *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460; *Hall* v. *Barrows*, 4 DeG., J. & S. 150. The word "Dover" has by use thus come to be simply descriptive of an egg-beater made under the Williams patent, and it became common to the public on the expiration of that patent.

The plaintiff contends that it has a right to protection under Pub. Sts. c. 76, § 1, providing that trademarks are not to be used without the consent of their owner. But the plaintiff derives no additional rights under this provision of statute, because the word "Dover" was used as the name of the machines, and not as a trademark, and it was not the intention of the

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statute to do away with the rule that the name of a patented article becomes open to general use upon the expiration of the patent. This rule has heretofore been incidentally alluded to in a way to imply that it was understood to be in force in this Commonwealth. *American Order of Scottish Clans* v. *Merrill*, 151 Mass. 558, 562. *Chadwick* v. *Covell*, 151 Mass. 190, 195.

The plaintiff further contends that the defendants have used the word "Dover" as a mark on their egg-beaters in a way calculated to deceive the public, independently of the question of the trademark. This, according to the contention of the plaintiff, means that they are passing off their goods as goods made for or by the plaintiff, and thus are injuring the plaintiff by unfair competition. No doubt the use of the word "Dover" on the egg-beaters is an advantage in the market; but this is an advantage which the defendants are entitled to have, unless the plaintiff has a valid trademark. It must now be assumed that the plaintiff has no trademark in the name, and that the name as well as the invention is open to common use. This being so, something more must be shown than merely that the defendants are making and selling egg-beaters similar in kind to those of the plaintiff, and under the same name. *Magee Furnace Co.* v. *Le Barron*, 127 Mass. 115. *Brill* v. *Singer Manuf. Co.* 41 Ohio St. 127. *Singer Manuf. Co.* v. *Riley*, 11 Fed. Rep. 706. *In re Leonard & Ellis's Trademark*, 26 Ch. D. 288. *In re Ralph's Trademark*, 25 Ch. D. 194, 198. *Singer Manuf. Co.* v. *Loog*, 8 App. Cas. 15. The evidence fails to show any violation of the plaintiff's rights in this respect. There is nothing in the making of the defendants' egg-beaters to indicate that they were made by the plaintiff, unless the use of the word "Dover" on the wheel. The defendants had a right to put this marking on the wheel. In form and construction and general appearance, there was some resemblance between the defendants' egg-beaters and the plaintiff's; but imitation in these respects is lawful. In *Fairbanks* v. *Jacobus*, 14 Blatchf. C. C. 337, it was held that, apart from patents and trademarks, "Any one may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person." This was

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cited and approved in *Brill* v. *Singer Manuf. Co.* 41 Ohio St. 127, 138, where it was held broadly that, "where machines during the time they are protected by a patent become known and identified in the trade by their shape, external appearance, or ornamentation, the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification in machines of the same kind, manufactured and sold by them." And in *Singer Manuf. Co.* v. *June Manuf. Co.* 41 Fed. Rep. 208, the above doctrines were reaffirmed with distinctness and emphasis. There is no unfair competition, apart from the infringement of a patent or trademark, unless the competing person so makes or marks his goods or conducts his business that purchasers of ordinary caution and prudence, and not those who are exceptionally dull, are likely to be misled into the belief that his goods are the goods of somebody else. *Gilman* v. *Hunnewell*, 122 Mass. 139, 148–150. *Singer Manuf. Co.* v. *Wilson*, 2 Ch. D. 434, 447, per Jessel, M. R., whose decree was affirmed on appeal. *Brill* v. *Singer Manuf. Co.* 41 Ohio St. 127. *Robertson* v. *Berry*, 50 Md. 591.

Looking at the whole case in the light of the defendants' right to use the word "Dover" and to make egg-beaters similar in construction and general appearance to those of the plaintiff, we find no proof of anything unlawful on their part.

Bill dismissed.

MARY A. HAMILTON *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. December 10, 1894. — March 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Personal Injuries — Street Railway — Negligence — Action.

An action cannot be maintained against a street railway corporation for personal injuries occasioned to a passenger in its car, on the ground that it ought to have avoided a runaway horse and herdic attached which ran into it and did the damage, as it was making a sharp turn into a street on the opposite side from the street down which the carriage came, and the driver of the car was stopping for passengers on his side; it being conjecture whether he knew that the carriage was coming.

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TORT, for personal injuries occasioned to the plaintiff while a passenger in one of the defendant's horse cars, on Cambridge Street in Boston, by the alleged negligence of the defendant. Trial in the Superior Court, before *Dunbar*, J., who, at the close of the evidence for the plaintiff and at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

L. S. Dabney & F. Cunningham, for the plaintiff.

M. F. Dickinson, Jr., for the defendant.

HOLMES, J. The plaintiff seeks to charge the defendant for personal injuries suffered by her, on the ground that its car ought to have avoided a runaway herdic which ran into it and did the damage. The grounds, however stated, are pure matter of guess work. It is conjecture whether the driver knew that the herdic was coming. It would be prejudice to say that he ought to have known, if he did not. There is no evidence on either point which amounts to anything except the relative situations. The time during which the herdic was in sight before the accident must have been very short. During the last part of that time, if not the whole of it, the car was making a sharp turn into Cambridge Street on the opposite side from Joy Street, down which the herdic came, and the driver was stopping for passengers on his side, so that his attention naturally was drawn away from Joy Street. But suppose the driver had known the danger; it was just as prudent for him to be where he was as to be anywhere else where he could have been. It is said that if he had gone a little faster the herdic would have cleared the rear platform, which it struck, or that if he had stopped in Chambers Street there would have been no collision. This is very well after the event; but beforehand the driver could not tell where the horse would go. A horse car cannot be handled like a rapier. Within the narrow limits of the possible, so far as the evidence shows, a prudent man had no reason to think one spot safer than another.

Exceptions overruled.

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J. MARK PHILLIPS & others *vs.* JOHN C. HADDOCK & another.

Bristol. January 10, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, & BARKER, JJ.

Damages to Vessel — Evidence of Time of Tide.

In an action for damages to the plaintiff's schooner caused by grounding in a dock in F., where it was to deliver a cargo of coal to the defendant, under a bill of lading stipulating that fifteen feet of water at high water or an ordinary tide were guaranteed, the plaintiff alleged that the grounding was due to the want of the guaranteed depth of water, to which the defendant replied that the schooner did not come in until the tide had fallen. It appeared that the accident happened between a quarter to seven and seven o'clock in the morning. The defendant, for the purpose of proving that high tide on that morning at P., which was fifteen miles from F. in a straight line and more by water, was at half-past five o'clock, offered in evidence an automatic register of a tide gauge kept by the city of P. and used by the United States in calculating the tides. This evidence was excluded; but the expert who produced the register was allowed to testify, from his data as to the tide in P., to a time of high tide in F., and he fixed it between twenty and thirty-eight minutes past five. There was other evidence that, under conditions like those testified to on the morning in question, the difference in the time of high tide at P. and F. would not be more than five or six minutes; and direct evidence of the state of the tide at F. was put in by both parties. *Held*, that it could not be said that the ruling excluding the evidence offered was wrong.

HOLMES, J. This is an action to recover for damages to the plaintiffs' schooner, caused by grounding in a dock in Fall River, where it was to deliver a cargo of coal to the defendants. It was stipulated by the bill of lading, as interpreted by the evidence, that fifteen feet of water at high water on an ordinary tide were guaranteed. The plaintiffs alleged that the grounding was due to the want of the guaranteed depth of water, to which the defendants replied that the schooner did not come in until the tide had fallen. The accident happened between a quarter to seven and seven o'clock in the morning. The defendants offered to prove that high tide at Providence on that morning was at half-past five, and for that purpose offered an automatic register of a tide gauge kept by the city and used by the United States in calculating the tides. This evidence was not admitted; and the defendants excepted.

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Providence is some fifteen miles from Fall River in a straight line, and more by water. The expert who produced the register was allowed to testify, from his data as to the tide in Providence, to a time of high tide in Fall River. He fixed it between twenty and thirty-eight minutes past five. It is true that there was other evidence that, under conditions like those testified to on the morning in question, the difference in the time of high tide at Providence and Fall River would not be more than five or six minutes, but this margin of eighteen minutes allowed by the expert well may have satisfied the presiding judge that the preliminary questions of fact to be settled by the jury before they could make any use of Providence as a standard for Fall River were difficult and uncertain. Direct evidence of the state of the tide at Fall River was put in by both parties, and under these circumstances a resort to inferences from more or less uncertain facts elsewhere was unnecessary. *Gilbert* v. *West End Street Railway*, 160 Mass. 403, 405. We cannot say that the ruling was wrong. *Exceptions overruled.*

A. J. Jennings & J. M. Morton, Jr., for the defendants.

J. F. Jackson, for the plaintiffs.

EZRA T. SEAVER *vs.* HAROLD WESTON.

Middlesex. January 15, 16, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Contract — Administrator — Action — Set-off — Promissory Note — Unauthorized Indorsement by Wife of Husband's Name — Ratification by Administrator of Husband's Estate.

If A. and B. execute a contract, by the terms of which A. is to deliver goods manufactured by him to B., who is to make certain advances of money, and A. dies before the contract is fully performed, and his estate is insolvent, and the administrator of his estate makes an agreement with B. to deliver the goods on hand pursuant to the contract with A., and B. is to account to and pay the administrator for the goods so delivered without regard to or giving any credit for the advances made by B. previously to A.'s death, the administrator may maintain an action in his individual capacity against B. for the goods delivered under the agreement, and B. is not entitled to set off a claim against A.'s estate for advances made to him under the contract.

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If the wife of a payee of a promissory note in good faith indorses the note in his name without his authority, he being unconscious by reason of illness, and the note, having been indorsed also by a third person for the payee's accommodation and at the wife's request, is discounted, and its proceeds go into his estate before his death, and the maker pays the note at maturity in ignorance of the nature of the indorsement, the administrator of the payee's estate may ratify the act of the wife in so indorsing the note.

CONTRACT, upon an account annexed, for lumber sold and delivered. The answer alleged that on October 17, 1888, one George P. Hardy and the defendant executed a written contract, by the terms of which Hardy was to sell and the defendant was to buy all the lumber manufactured at Hardy's mill in Vermont, from November 1, 1888, to November 1, 1889, and the defendant was to advance to Hardy the sum of one thousand dollars each month until a certain sum had been advanced, which was to be paid by the defendant's notes; that Hardy delivered the lumber to the defendant, who made the advances as provided in the contract; that Hardy died on June 17, 1889, when the contract was not fully performed; that the plaintiff was afterwards appointed administrator of Hardy's estate, and assumed the unfinished contract and undertook to complete the same; that all lumber delivered by the plaintiff to the defendant was delivered under and in performance of said contract; that all transactions between them were had with the plaintiff as administrator of Hardy's estate, and not in his individual capacity; and that this action was brought for the benefit of Hardy's estate, and any sum recovered would belong to the assets of that estate. The defendant also filed a declaration in set-off for advances made to Hardy under the contract. Trial in the Superior Court, without a jury, before *Sheldon*, J., who refused certain requests of the defendant for rulings not material to be stated, and found for the plaintiff, disallowing in set-off all advances made by the defendant under the contract previously to the death of Hardy; and the defendant alleged exceptions. The facts appear in the opinion.

D. C. Linscott & C. P. Weston, for the defendant.

J. C. Burke, for the plaintiff.

KNOWLTON, J. At the time of the death of the plaintiff's intestate, George P. Hardy, there was a large quantity of unmanufactured lumber in his possession which passed to the plaintiff

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by virtue of his appointment as administrator. This he could dispose of for the benefit of the estate in any reasonable way. He was accountable for the proceeds of it under his official bond. If he chose not to carry out the contract which Hardy had made in his lifetime with the defendant, the latter would have a claim for damages against the estate. The estate was insolvent, and under the laws of Vermont claims against it would be proved before commissioners, and, upon allowance, their owners would share the assets *pro rata*. This suit is brought by the plaintiff, not as administrator, but in his individual capacity, on a contract made with the defendant after Hardy's death. The plaintiff as an individual could make a contract in regard to the lumber with the defendant as well as with anybody else, and by such a contract a liability might be created to the plaintiff personally. The court found, upon the evidence, "that the plaintiff did undertake to furnish, and did furnish, the defendant lumber pursuant to said contract of October 17, 1888, so far as kinds, quantity, qualities, prices, and place of delivery were concerned; but that the defendant agreed and was bound to account to and pay the plaintiff for whatever lumber the plaintiff delivered after he was appointed administrator of the Hardy estate, and without regard to or giving any credit for the advances made by the defendant previous to the death of Hardy." The finding was well warranted by the oral testimony at the trial, and by the auditor's report, which was a part of the evidence. Under this finding it is clear that the action can be maintained in the plaintiff's individual capacity, and that the defendant is not entitled to set off his claim against the estate of Hardy for advances. *Davis* v. *Estey*, 8 Pick. 475. *Grew* v. *Burditt*, 9 Pick. 265. *Kent* v. *Bothwell*, 152 Mass. 341. *Catlin* v. *Allen*, 17 Vt. 158. *Aiken* v. *Bridgman*, 37 Vt. 249. *Hatch* v. *Hatch*, 60 Vt. 160. *Gifford* v. *Thomas*, 62 Vt. 34, 37. *Bates* v. *Sabin*, 64 Vt. 511.

Two of these advances were made by notes payable to Hardy's order, which were sent to him at a time when he was unconscious by reason of the accident which caused his death, and were indorsed in his name by his wife while he remained in that condition, and were subsequently indorsed by the plaintiff for the accommodation of Hardy at his wife's request, in order that

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she might get them discounted at bank. The proceeds of these notes went into Hardy's estate, by direction of his wife, before his death. The defendant paid them at bank at maturity, in ignorance that the indorsement of Hardy's name upon them was not by his own hand. The court found as a fact that the plaintiff, after his appointment as administrator, ratified the acts of Hardy's wife in indorsing the notes.

We are of opinion that he could lawfully ratify these acts, which were done in good faith in the name of the deceased for his benefit. There is no doubt that Hardy could have ratified them in his lifetime, even after the notes had been paid, and we see no good reason why his administrator could not do it with the same effect. It follows that these two notes stand no differently from the others in relation to this case.

These two findings of fact make most of the defendant's requests for rulings immaterial, and we see no error in the rulings nor in the refusals to rule at the trial. Under these findings the presiding justice properly found for the plaintiff for the amount due under his contract made with the defendant after Hardy's death. *Exceptions overruled.*

NEW YORK AND NEW ENGLAND RAILROAD COMPANY *vs.* JOSEPH J. FEELY.

Suffolk. January 21, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Railroad — Action to recover Fare of Passenger — Evidence — Waiver — Principal and Agent.

In an action to recover a passenger fare a railroad corporation may put in evidence its printed schedule of trains to show that a certain train did not stop regularly at a certain station.

Tendering a coupon from a season ticket not good for his ride does not relieve a passenger from paying his fare in cash, although on previous occasions such coupons have been accepted for such rides, and although he may have been told by brakemen or gatemen that the train was a train for his station, or, upon a former occasion, that his ticket was good for passage by that train.

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CONTRACT, to recover sixty-nine cents, the amount of a fare on the plaintiff's railroad between Boston and Franklin. Trial in the Superior Court, without a jury, before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

Edwin G. Cowell testified that he was a conductor in the plaintiff's employ; and that he was the conductor on the train leaving Boston at six o'clock in the evening of May 26, 1893, and had been running on that train about three or four days. A printed schedule of trains on the plaintiff's railroad was at this point offered and admitted in evidence, against the defendant's objection; and the defendant excepted. It appeared from this schedule that the first stop made by the train in question after leaving Boston was at Franklin, where it arrived at 6.42 P. M. The witness further testified that he remembered that the defendant was a passenger on the train; that when the witness was collecting the tickets the defendant presented a season ticket good between Boston and Walpole; that the witness told the defendant that he could not take the ticket, and that the train did not stop at Walpole, to which the defendant replied that the ticket was good, and he had ridden with other conductors on those tickets; that the witness then told him that he could not accept the ticket "according to the clause in the contract," and demanded fare to Franklin, which the defendant refused to pay, and the witness told him that he would report it at the office; that the witness had never accepted a ticket of this kind from any passenger on this train; that the fare to Franklin was sixty-nine cents, and to Walpole forty-eight cents; that there was a crossing of the plaintiff's railroad with another railroad at grade in Walpole; and that the train stopped before reaching the crossing, the locomotive engine being about five hundred feet from the crossing, and the station being in the angle made by the crossing.

The ticket held by the defendant contained the following printed provision: "Issued to and to be used only by J. J. Feely between Boston and Walpole." Then followed a printed statement, as follows: "Good only for passage on trains which stop regularly at the stations named, when officially stamped, and upon the conditions named in contract on back of this ticket," the contract being printed on the last page of the ticket.

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On cross-examination, the witness testified that the train had only been running since May 7, 1893; that there was a man placed at the gate of the station in Boston to direct passengers to the trains; and that it was also one of the duties of the brakemen to announce to passengers the stations at which the trains stopped.

Henry J. Lindley testified that he was the conductor on the train in question for about two weeks following May 7, 1893; that he never saw any passengers get off at Walpole, and he never collected any tickets for Walpole; that there was a man in charge of the gate at the Boston station, whose duty it was to give passengers information as to the destination and stopping places of the trains; and that neither he as conductor nor the brakemen on this train took any part in announcing the stops.

The defendant testified that he had ridden on this train twice before the occasion in question; that, on the first occasion he "asked the gateman, who was standing there, whether this train stopped at Walpole for the accommodation of season ticket holders, and he said it did stop at about that station, and that the season ticket holders did and could use it." He further testified: "I thereon took the train; the brakeman was there at the time I took it, and just as I was going into the train the brakeman said, 'Going through?' or 'Where are you going?' and I said, 'I am a season ticket holder going to Walpole.' He said, 'That is all right,' and I got on board the train. The conductor came along — I forget who the conductor was — and took the ticket. The second time that the ticket was taken, I remember distinctly it was not Lindley, but I think some one stouter than Lindley. It was a week day, and on both those occasions the tickets were accepted when I went out. The third time I took this train, I went on board the usual way. I did n't see the conductor that night; the brakeman was right there, and I said 'Walpole?' and he said 'Yes,' and I got on board and the train started up, and when at Hyde Park Cowell came along and I passed him the coupon. As he took it he said something I can't remember, and went to the rear of the train, but he finally came back and said he could n't take that coupon, it was n't good upon that train. I told him it had been taken upon previous occasions. He then demanded a cash fare to Franklin. I told him

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it had been taken upon previous occasions, and I did n't propose to pay the cash fare to Franklin. He took my name and said he would report the matter."

At the close of the evidence, the defendant requested the judge to give the following rulings:

"1. The defendant cannot be compelled to pay a cash fare from Boston to Walpole, or any point beyond, merely because he rode upon said train upon the date in question, and without having an opportunity to alight from said train before reaching Walpole. In order to obligate him to pay a cash fare upon said train for such distance, he must have had actual notice that a season ticket coupon would not be accepted upon said train for such distance.

"2. The plaintiff, by its action in previously inducing the defendant to ride to Walpole and accepting said season ticket coupon for fare without objection on its part, so far waived the provision of said ticket that it was 'good only for passage on trains which stop regularly at the stations named,' etc., that, the defendant having entered said car without objection, it cannot compel the defendant to pay a cash fare without giving him notice that such ticket would not be accepted on said train, and giving him an opportunity to alight therefrom.

"3. If the plaintiff corporation induced the defendant to go upon said train under such representations or inducements upon the part of the plaintiff, or its servants or agents in charge of said train, or having authority to give such information to the patrons of the road in relation to said train as might fairly lead the defendant to believe that one of the purposes for which said train was used was to carry passengers, including season ticket holders, to the point where the train made its usual stop in Walpole, and the defendant, so believing that such use might properly be made of such train, got upon said train and tendered his season ticket for detachment of a coupon to the conductor, and after the train started was informed for the first time that such tickets were not good upon said train, then the defendant is not bound to pay a cash fare for the distance ridden upon said train if he desires to get off and does get off at the first point where the train stops enabling the defendant so to get off said train.

"4. Upon all the evidence in the case, the plaintiff is not entitled to judgment."

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The judge declined to give the first, second, and fourth rulings requested, and gave the third ruling, but found, as matter of law, upon the foregoing evidence, that the gateman or the brakeman could not waive any of the printed conditions of the season ticket; and found for the plaintiff in the sum of forty-eight cents, being the amount of a cash fare between Boston and Walpole. The defendant alleged exceptions.

T. E. Grover & A. C. Smith, for the defendant.

F. A. Farnham, for the plaintiff.

BARKER, J. The defendant's exception to the admission in evidence of the schedule of trains issued on May 7, 1893, and in force when the defendant took the ride for which the plaintiff asks pay, must be overruled. It was not merely a declaration, but an act designating the train which the defendant took as a train which did not stop regularly at Walpole; and so an act designating that train as one on which the defendant did not have the right to go, under the contract set out upon his season ticket.

Nor can the defendant invoke the doctrine that a passenger who by mistake takes a wrong train is not obliged to pay for his ride to the first station at which he has the opportunity to alight. He boarded the train intending to ride upon it as a passenger for pay to the station at which he left the train; and his mistake in supposing that a coupon from his season ticket would be received in compensation did not render him less liable to pay for the service to which he intended to subject the plaintiff, and which it performed as he had expected. Having intended to ride upon that train from Boston to Walpole, he became a passenger upon the footing that he was to make compensation for the service rendered, and the question is whether the tender of the coupon was a proper offer of compensation. If upon two previous occasions, as the defendant's evidence tended to prove, and the plaintiff's evidence tended to disprove, the conductor had accepted coupons from his season ticket for passages upon this train from Boston to Walpole, the acceptance of the coupons did not show a waiver of the contract that the ticket should not be good for passage upon that train, but merely a waiver of the plaintiff's right to collect cash fares for those two rides. When he took the train on this occasion, all his conversation with the

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gateman consisted in his own question, "Walpole?" and the gateman's answer, "Yes." He said nothing to the gateman about his intention to use his season ticket in payment of his fare to Walpole, and all that the answer could justify him in believing was that a passenger could use the train for a passage to Walpole. He was not told on this occasion that his ticket was good, and if he had been so told by a gateman upon a former occasion, it was competent for the trial court to find that the statement was a waiver of the condition of the ticket for that passage only. The ruling that the gateman or the brakeman could not waive any of the printed conditions of the ticket was one which we cannot say is shown by the exceptions to have been erroneous, and the third ruling requested was allowed by the court except that in connection with it the ruling just mentioned was made.

These considerations show that the rulings of law requested and refused were properly refused, because not well founded in law upon the facts as established in the view of the trial court. *Exceptions overruled.*

WILLIAM L. FREEMAN *vs.* F. W. HUNNEWELL & others, trustees.

Suffolk. January 22, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Landlord and Tenant — Condition of Elevator — Action.

An action cannot be maintained against the owner of a building, in which is a freight elevator for the use of tenants which the owner retains in his control and keeps in repair, for personal injuries occasioned to a boy fifteen years of age in the employ of a tenant by falling through an open space at the second floor of the building between the platform of the elevator and the rear wall of the building, if the plaintiff's rights on the elevator were only those of his employer, and the defendant owed the plaintiff no duty to change the construction and arrangement of the elevator, and there is no evidence to show that the plaintiff was in the exercise of due care.

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TORT, for personal injuries occasioned to the plaintiff by an alleged defect in an elevator in a building owned by the defendants in Boston.

Trial in the Superior Court, before *Richardson*, J., who, upon all the evidence, ruled that the plaintiff could not recover, and directed a verdict for the defendants; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. A. McGeough, for the plaintiff.

C. R. Clapp, for the defendant.

KNOWLTON, J. The defendants are owners of a building five stories high, in which is a freight elevator for the use of tenants, which the defendants retain in their control and keep in repair. The rear wall of the building forms one side of the elevator well, and above the third floor it is built out into the room about fifteen inches, so that the well is smaller above the second story than in the lower stories of the building. The elevator is an open platform, built of such size as to pass up and down in the upper stories, where the well is narrowed by the construction of the wall, and when the elevator is at rest at the second floor there is an open place $4\frac{7}{10}$ feet long and 15 inches wide between the platform of the elevator and the rear wall of the building, which forms one side of the well. The plaintiff, a boy fifteen years of age employed by the tenants who occupied the second and third floors of the building, had been accustomed to use the elevator daily for four months. The common way of using it was to ride up and down upon it with the freight which was carried. He was injured by falling through this open space at the second floor of the building between the platform of the elevator and the wall.

His rights upon the elevator were only those of his employers, who were tenants of the defendants. When they hired the building the elevator was in the same condition as at the time of the accident. They having hired their tenement with an elevator so constructed, the defendants did not owe them nor their employees any duty to change this construction. *Woods* v. *Naumkeag Steam Cotton Co.* 134 Mass. 357. *Quinn* v. *Perham*, 151 Mass. 162. *Moynihan* v. *Allyn*, 162 Mass. 270. There was no evidence of negligence on the part of the defendants.

There was no evidence of due care on the part of the plaintiff.

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The accident happened between one and two o'clock in the afternoon. The plaintiff knew of the existence of the hole, and must have known that there was danger of falling through it if he did not keep his feet upon the platform. There was nothing to show that he used any care to keep from falling, or that the accident happened from any cause other than his own inattention and negligence. *Exceptions overruled.*

CHARLES H. ROBINSON & another *vs.* FANNIE D. WAY, executrix.

Suffolk. January 23, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Trover — Demand — Waiver — Action.

A. delivered a desk to B. under an agreement for purchase on the instalment plan, by which A. had the immediate right of possession on B.'s failure to make the specified payments. B. failed to make these payments. C. attached the desk in a suit against B., and told the officer to put the desk "where they would not know where it was." C. had also said that A. had been trying to get a desk, but he had got it put away where A. could not find it. *Held*, that, upon these facts, A. could maintain an action for the conversion of the desk by C. without proof of a demand.

If A. delivers property to B. under an agreement for purchase on the instalment plan, by which A. has the immediate right of possession on B.'s failure to make the specified payments, and the property is attached and taken from B.'s possession by C. in a suit against B., who thereupon declines to make any payments until the property is returned to him, and A. then replevies and returns the property to him, this does not show a waiver of A.'s right of possession for non-payment by B.

It is not necessary, in order to maintain an action of trover, that the defendant should have it in his power, at the time the action is brought, to give up property which he previously has converted to his own use.

HOLMES, J. This is an action for the conversion of a desk. The plaintiffs had delivered it to one Gilman, under an agreement for purchase on the instalment plan, by which, as usual, the plaintiffs had an immediate right of possession on Gilman's failure to make the specified payments. Gilman had failed to make these payments. The defendant's testator, Mr. John M.

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Way, attached the desk in a suit against Gilman, and told the officer to put the desk where they would not know where it was. It also appeared that he said that the plaintiffs had been trying to get a desk, but he had got it put away where they could not find it. The foregoing facts make out a plain case for the plaintiffs without the need of a demand. *Hubbard* v. *Lyman*, 8 Allen, 520. *Baker* v. *Lothrop*, 155 Mass. 376, 378. *Robinson* v. *Besarick*, 156 Mass. 141, 143.

The defendant relies upon testimony that the desk had been taken from Gilman's possession before under Mr. Way's attachment, that Gilman thereupon declined to make any payments until the desk was returned to him, and that the plaintiffs replevied and returned the desk to him. But this testimony, if believed, did not show a waiver of the plaintiffs' right of possession for non-payment. It showed simply a restoration of the *status quo ante*, when disturbed by a third person. It had no reference of any kind to the rights of the plaintiffs as against Gilman.

The only request for a ruling needing special mention is the fourth. This was "that no recovery can be had in this action against the defendant unless it shall appear that before a demand and refusal the defendant actually converted said property, or that the defendant at the time this suit was brought had it in his power to give up the property." The request was copied from one in *Johnson* v. *Couillard*, 4 Allen, 446, except that the words "at the time this suit was brought" are substituted for "at the time of the demand and refusal." The substitution makes nonsense of the request. If the "or" be taken to mean an alternative, there is no such relation between the two members of the hypothesis. If, as is necessary to give a semblance of meaning to the word, "or" is to be read as "and," it is not necessary that a defendant should have it in his power at the time a suit is brought to give up property which he previously has converted to his own use. The bill of exceptions gives us no reason to suppose that the judge denied or failed to instruct the jury that the plaintiff must prove a conversion, or that he failed to explain to them what it was and how it might be established. *Exceptions overruled.*

J. W. Keith, for the defendant.

W. A. Morse, for the plaintiffs.

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HENRY KELLOGG, JR. *vs.* PORTER A. UNDERWOOD & another.

Suffolk. January 23, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Poor Debtor's Recognizance — Action.

In an action upon a poor debtor's recognizance against A. as principal and B. as surety, it appeared that, subsequently to the arrest of A. on the original execution, the plaintiff caused the arrest of C., another of the judgment debtors named in the original judgment, on an alias execution, and C. was committed to jail, from which he was discharged under the statute by order of the plaintiff after C. had claimed support as a pauper. *Held*, that the action would lie.

CONTRACT, upon a poor debtor's recognizance, entered into by Porter A. Underwood as principal and John F. Simmons as surety. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, which recited that the plaintiff was entitled to recover judgment against the defendants for the penal sum of the recognizance sued on unless the following facts entitled the defendants to a finding in their favor, in which case judgment was to be entered for the defendants.

Subsequently to the arrest of the defendant Underwood on the original execution, where the defendant Simmons went surety, as declared on by the plaintiff, the plaintiff on November 24, 1893, caused the arrest of Thomas Smythe, another of the judgment debtors named in the original judgment, on an alias execution, and Smythe was duly committed to jail on said last named day, having declared before a judge of the Municipal Court of the City of Boston, that he did not desire to take any oath, or to recognize in any manner.

On August 3, 1894, the plaintiff, as appeared by indorsement on the execution, declined to pay any support for Smythe after said August 3, and the further indorsement of the jailer appeared thereon bearing date of the following day: "The within named debtor, Thomas Smythe, having claimed support as a pauper, the within named judgment creditor therefore ordered his discharge

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from imprisonment, under section 46 of chapter 162 of the Public Statutes, and I have discharged said Smythe from imprisonment."

G. W. Buck, for the defendants.

C. F. Eldredge, for the plaintiff.

KNOWLTON, J. By the common law, the arrest of a debtor on an execution and his voluntary release by the creditor are a satisfaction of the judgment, so that no alias execution can be taken out or other proceedings had under it. *Coburn* v. *Palmer*, 10 Cush. 273. *Nowell* v. *Waitt*, 121 Mass. 554. *Kennedy* v. *Duncklee*, 1 Gray, 65.

If we assume in favor of the defendants that this is the law to-day in Massachusetts, the principle is not applicable to the present case. Pub. Sts. c. 162, §§ 45, 46, provide for the support of a debtor who is confined in prison on mesne process or execution in a civil action, and who claims support as a pauper. In such a case the creditor may furnish money or security to the jailer for his support, or may order him to be discharged, or, if the creditor fails to provide for his support within twenty-four hours after a demand by the jailer, the jailer shall discharge him. By § 47 of the same chapter it is provided that, when a debtor is so discharged by order of the creditor or by the jailer, "the debt and costs, with all sums paid by the creditor for the debtor's support in prison, shall remain a legal claim against his goods and estate, and may be enforced accordingly in the same manner as if he had not been committed on execution; but his body shall never thereafter be liable to arrest or imprisonment for the same debt, costs, or charges." There are similar provisions for a case where the debtor takes the oath for the relief of poor debtors, and for some other cases under the statute. The effect of these provisions is to leave the judgment in full force, except that no execution can be issued under it for the arrest of the body of a defendant who has been so discharged. Execution may be issued against his property, or against the person or property of a co-defendant, and proceedings may be had under it against the property of any defendant, and against the body of any defendant except him who has been discharged from arrest, with the same force and effect as if no arrest had ever been made. *Cheney* v. *Whitely*, 9 Cush. 289. *Raymond* v. *Butterworth*, 139 Mass. 471.

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It follows that the recognizance sued on in the present case was not discharged or affected by the subsequent arrest of a joint defendant and his discharge from imprisonment under the statute by order of the creditor after he had claimed support as a pauper. *Judgment affirmed.*

MICHAEL McPHEE *vs.* JOHN T. SCULLY.

Suffolk. January 24, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Ordinary Care — Assumption of obvious Risks — Action — Breach of Duty by Employer — Employers' Liability Act — "Superintendence" — Declaration.

A workman attempting a dangerous task, which he can do safely if the other persons concerned act with due care, may be found to be in the exercise of ordinary care, although accepting the obvious risks of his work; and he may have compensation for personal injuries, if back of all obvious dangers there is a breach of duty on the part of his employer, the risk of which he has not assumed, and which may fairly be found to have been the cause of the accident.

A foreman having authority to employ and dismiss men, who has charge of a job and gives all the directions to the men, and does not work and is not expected to work with his own hands, is a person whose sole or principal duty is that of superintendence, although there is a general superintendent over him.

If a drunken superintendent employed by a master chargeable with knowledge of his intemperate habits allows machinery to be operated by a workman who is evidently intoxicated, and orders the intoxicated workman to do an act which must obviously cause unnecessary danger to another workman, who is thereby hurt, a breach of duty to the latter both at common law and under the employer's liability act may be found on the part of the master which will support a declaration either at common law or under the act.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by having his hand crushed in a pile-driver. The declaration contained two counts, the first of which was at common law, and the other under the employers' liability act, St. 1887, c. 270. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

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J. Lowell, Jr., (*S. H. Smith* with him,) for the defendant.

C. G. Fall, for the plaintiff.

BARKER, J. The defendant contends that the verdict against him should be set aside; first, because the evidence does not sustain the burden of showing that the plaintiff was in the exercise of due care; secondly, because the plaintiff ought to be held to have assumed the risk; thirdly, that the accident happened through the negligence of a fellow servant; and fourthly, that, if the evidence shows a cause of action, the proof does not support the allegations of the declaration.

The work was driving piles. The plaintiff was one of a gang of seven men, of whom one Fahey was foreman. At the time of the accident the plaintiff was aloft standing on a joist, swinging and steadying a suspended pile, to put it in position. This work was to be done by applying his strength directly to the pile, and he put his left hand on top of the pile and his right arm between the pile and one of the upright beams between which the pile stood. The driving-hammer was five feet above him, upheld by a chocking-block on which it rested while the piles were placed in position. The placing of his hand upon the top of the pile, directly in the line of descent of the hammer if it should fall, is the act which the defendant contends should charge the plaintiff with contributory negligence. But the fall of the hammer while the plaintiff was at his post was not to be expected; and if it should occur, there was no position in which he could do his work of which safety could be predicated. He had a right to expect that the hammer would not fall, and the jury might find that he was in the exercise of ordinary care.

Whether he had assumed the risk of injury from the accidental fall of the driving-hammer is a different question. It was obvious that, if it should fall while he was at work aloft, his serious injury would be an almost inevitable result. It was also obvious that the hammer would fall if the chocking-block or its supports were defective, or if the block should be accidentally or intentionally displaced. He consented to work exposed to this danger of injury by the fall of the hammer as the machine was constructed, and he also consented to work exposed to this danger so far as it might be caused by the carelessness of his fellow workmen. There was no evidence from which it could

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be found that the pile-driver or any of its appliances were out of repair or defective; and the immediate cause of the unexpected fall of the hammer was the accidental pulling away of the chocking-block by the strain of the gypsy fall, which a drunken fellow workman, who had the fall in hand, negligently allowed to get over the block in such a way that when made taught it pulled the block out from under the hammer. The end of the chocking-block projected some three inches beyond the outer face of the upright beam against which it stood when in place under the hammer, and it was obvious that the gypsy fall might get over the projecting end, and that, if the fall should be straightened when attached to a pile and over the projecting end of the chocking-block, the block might be pulled from its place and the hammer released. These obvious risks the plaintiff must be taken to have understood and to have assumed. But this is not conclusive against his right to have compensation for his injury, if upon the evidence there was, back of the dangers of which he assumed the risk, some breach of duty towards him on the part of his employer which could fairly be found to have been the cause of the accident. Such breaches of duty are charged in each count of the declaration. In the first count, the employing of careless, incompetent, and reckless fellow workmen, whose carelessness, incompetency, and recklessness were known, or might with reasonable care and diligence have been known, to the defendant, — a breach of duty at common law. In the second count, negligence of a person in the defendant's service, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, — a breach of duty imputed to the employer by force of the St. 1887, c. 270. The evidence justified a finding that the foreman and the workman who got the fall foul of the chocking-block were drunk, and others of the men had been drinking at their work, from a bottle of liquor for which the foreman had sent one of the men. The foreman had been working for the defendant eight or nine years, and the defendant testified that he never saw him intoxicated at his work before the accident; that he had seen him intoxicated a good many times, but not at his work; that he never saw him under the influence of liquor at his work; that he never saw him at the work but that he was able to do his

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work right; and that ever since he knew him the foreman's habits had been as he described. But one of the men gave evidence from which the jury might find that the foreman had before this occasion drank liquor, and been intoxicated at his work when the defendant was present, and the defendant's general superintendent testified that he had seen the foreman a number of times under the influence of liquor, perhaps half a dozen, and did not state that these were not times when the foreman was at his work; and another workman testified that on a previous occasion the foreman had been under the influence of liquor, and compelled to go home at noon. This evidence would justify the jury in finding that the foreman was an incompetent and reckless man, whom the defendant had employed either knowing his faults or chargeable with knowledge of them. The evidence also tended to show, not only that the foreman and the workman who handled the fall were drunk at the time of the accident, but that the appearance of the latter showed him to be drunk. The fouling of the chocking-block by the fall was plainly to be seen, and the order to "hoist again," which caused the straightening of the fall and the displacement of the guard, was given by the foreman. Either leaving the fall to be handled by a workman apparently intoxicated or giving the order to "hoist again" when the fall was foul of the chocking-block might be found to be an act of great carelessness, resulting directly from an unfitness of the foreman, known by the defendant or with knowledge of which he was chargeable, and which made it a breach of his duty toward the plaintiff to keep the foreman at work with the plaintiff. This breach of duty was sufficiently shown to have been the cause of the accident to enable the jury to find for the plaintiff upon that ground. This is so, in our opinion, upon either count of the declaration; under the first count, for an injury resulting from a breach of the defendant's duty to use due care in providing for the plaintiff proper fellow workmen; and under the second count, for negligence of the foreman in giving the order to "hoist again" when if he had been careful he would have seen that the fall was foul of the block, as well as for negligently allowing the fall to be handled by a workman apparently intoxicated, in each of which acts the foreman was exercising superintendence.

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The defendant insists that the plaintiff did not sustain the burden of showing that the foreman's sole or principal duty was that of superintendence; but while another person was employed by the defendant as his general superintendent, that person was not present at the time. The defendant testified that the foreman was foreman of the gang, and had authority to employ and dismiss men, and frequently had charge of the jobs. There was abundant evidence that he had charge of this work, and gave all the directions which were given, and no testimony that he worked or was expected to work with his own hands. The evidence required a finding that on this occasion at least the foreman's sole or principal duty was that of superintendence.

The defendant's contention that the proof did not support the allegations of the declaration cannot be sustained. The charge in the first count, of employing incompetent men, did not rest alone upon his employment of McQuade, who handled the fall, and was supported by the evidence as to the foreman. The specification in the second count as to the negligence of the foreman "in failing properly to use, handle, manage, and control said pile-driver and the engine, machinery, dog, yoke, chocking-block (so called), gearing, ropes, and guys thereof," must, after verdict, the evidence having been admitted without objection, be held to have been supported by proof that the foreman negligently allowed the fall to be handled by a drunken workman, and that the foreman himself negligently gave the order to "hoist again" when the fall was fouled with the chocking-block.

Exceptions overruled.

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THOMAS CARROLL *vs.* LYMAN D. WILLCUTT.

Suffolk. January 25, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Negligence — "Ways, Works, or Machinery" — "Superintendence" — Law and Fact.

If there is no defect in the material, plan, or construction of a staging, the presence of a stone upon it, by the falling of which personal injuries are occasioned to a workman, is not a defect in ways, works, or machinery within the meaning of St. 1887, c. 270.

While, in an action for personal injuries occasioned to the plaintiff by the falling upon him of a ledge stone from a staging near which he was working, the jury might have found that the sole or principal duty of the defendant's foreman was that of superintendence, they were rightly directed to return a verdict for the defendant if the evidence did not justify a finding that the foreman was negligent in not discovering that the ledge stone was so placed as to be liable to fall.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration contained three counts, the first two under St. 1887, c. 270, and the third at common law. At the trial in the Superior Court, before *Dunbar*, J., it appeared in evidence that the defendant, who was a contractor, had been engaged for some weeks previous to Friday, November 25, 1892, the day on which the accident occurred, in building an addition to a stone church in Brookline.

The plaintiff testified that "George Grant had charge of the work there. He gave his orders to every man in the place. I got my orders from him. I did not notice any difference when Willcutt was there. I saw Grant speak to Willcutt. He, Grant, acted all the time as though he was boss there, — foreman. He took plans and read them and laid out the work from them." The plaintiff began work on the Monday preceding the day of the accident, and previously he had been in the defendant's employ off and on for about twenty years, and had done stonework part of the time. At the time when the plaintiff began work, the stone walls of the addition were nearly completed. On the forenoon of Wednesday, November 23, Grant ordered the plaintiff, while he was at work mixing mortar, to

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assist some other workmen then engaged in pulling down an old wall, in front of which was a staging for the workmen to stand on. North of this wall was the old part of the church. The plaintiff went to the staging by a ladder outside the church and near the east end of the old wall. He stood at the east end, facing it, and threw stones he received from two workmen sidewise on to the grass outside. The plaintiff, having been thus engaged for about an hour, quit at noon, and in the afternoon resumed work at the mortar bed. The plaintiff said, on cross-examination, that when he went to work on the old wall he saw at right angles to the old wall, and nearly on a level with the staging, another staging, and all the time he was engaged in pulling down the old wall his back was turned to the other staging. At this time a wall was being built by the defendant at right angles to the old wall, and was called the new wall, in which there was a large space like a window. On the outside and inside of said wall were platforms, or a staging, which extended the whole length of the new wall, the distances being about thirty-five or forty feet. The plaintiff knew that work had been done on this new wall two days before the day upon which he was injured, and his position at the time he was engaged in throwing down stones from the old wall on to the grass outside was near the junction of the old and new walls, facing the old wall. A mason in the defendant's employ was engaged on the outside staging of the new wall on Wednesday, building the wall. He testified that on the south end of the inside staging was a quantity of ledge stones; that they were there when he began work Wednesday morning, and when he quit work Wednesday night; that no work was done on the new wall or its stagings by the defendant's employees on the following Thursday or Friday. No work was done on or about the building on Thursday, as it was a holiday. The plaintiff was engaged on Friday in mixing mortar at the mortar bed during the forenoon. In the afternoon he was ordered by Grant to go to the cellar of the addition to the church, and clean from the mortar all the old bricks he found there; "to clean them first and then put them under cover in the cellar of old part of church, as it looked like rain." The entrance to this cellar was under the old wall which was being taken down. The new cellar was not boarded in or roofed. The plaintiff

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went to the cellar through the entrance from the old cellar. He found a large pile of old bricks in the vicinity of the southeast corner of the new cellar. There was a large rock about five feet west of the stone foundation of the new wall, and close by the pile. The plaintiff made a seat with a board, one end resting on the rock and one on the ground, and, sitting on the board with his legs stretched out, began cleaning bricks in the pile. He sat with his back to the foundation of the new wall, about six feet therefrom, and as he cleaned the bricks threw them in a pile near the entrance of the old cellar. The defendant's attorney asked the plaintiff, "As near as you can get it, then, about two feet from the staging which was on the very same new wall near the junction of which you had been working two days before?" *Ans.* "Yes, sir." The plaintiff testified that he saw only one upright piece of timber in the new cellar, which piece stood close to the southeast corner of the wall of the new cellar; that there were no ledger boards or putlogs connected with it, such as are used in building the lower parts of a staging, to be seen. The defendant's attorney asked the plaintiff: "All you saw was the staging?" *Ans.* "I did n't see the staging. I went into the cellar and I see nothing." "You knew it was there though?" *Ans.* "No, I did n't think anything about it. I went into the cellar and I see nothing to show me there was a staging. I did n't know the staging." The plaintiff testified that he did n't know there were stones on the wall near the place where he was cleaning brick; that when he helped the men take the stones from the old wall, he did not mind what they were doing on the new wall two days before; that he saw no person at this time working in his vicinity, and that his attention was directed to the work he was ordered to do. While the plaintiff was so at work, a stone fell on his head, injured his skull, glanced, struck his leg, fractured the fibula, and produced compound fracture of the tibia, and, in the opinion of the plaintiff's doctor, permanently disabled him. It was a new ledge stone, about eighteen inches long, six inches wide, and four inches thick. Its edges were ragged and sharp, and there was no mortar on it. Two of the defendant's masons had been working all that day on the south gable of the addition at a place considerably higher than the wall known as the

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new wall being built, and from their position they could see this wall and inside staging. They noticed a large ledge stone on the southerly end of this inside staging. A considerable part of this stone projected over the outside edge of the inside staging. One of the masons called the other's attention to its dangerous position. The stone was there when they began work that morning. There were a number of other ledge stones on the staging near this end. In the afternoon of that day these workmen saw a carpenter, in the employ of a contractor who was doing the woodwork of the addition, get on the inside staging near where the ledge stones were, from the flooring of the addition south of the place where the new wall was being built. There was no cellar under this part of the addition, and the walls of this part were about completed. The carpenter had hold of a rafter about sixteen feet long, and was hoisting it to a person on the frame roof of the addition south of him. The rafter either hit the projecting ledge stone previously mentioned, or jarred the staging, so that the stone fell, and they heard the plaintiff scream. The distance from the staging to the ground was about twenty feet. The carpenters had been for some time previously accustomed to use the staging for the purpose of hoisting timbers to the other carpenters working on the roof, but there was no evidence that the plaintiff knew this.

The judge directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

E. H. Pierce, for the plaintiff.

J. Lowell, Jr., (*S. H. Smith* with him,) for the defendant.

BARKER, J. The plaintiff cannot recover upon the first count. There was no defect in the material, plan, or construction of the staging, and the presence of the stone upon it was not a defect in ways, works, or machinery, within the meaning of the statute. St. 1887, c. 270. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131. *Lynch* v. *Allyn*, 160 Mass. 248, 252. *Burns* v. *Washburn*, 160 Mass. 457.

While the jury might have found that the sole or principal duty of the defendant's foreman was that of superintendence, we are of opinion that the evidence did not justify a finding that the foreman was negligent in not discovering that the ledge stone was so placed as to be liable to fall. The case is in some

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respects similar to *McCauley* v. *Norcross*, 155 Mass. 584, on which the plaintiff relies, but in that case the building was much nearer to completion than in this, and the opening through which the beam fell was one designed for the use of the workmen, having been left in the floor for the purpose of occasionally hauling up materials and to enable workmen to fasten the ropes of a derrick to iron columns above. And in that case the evidence tended to show that the superintendent had occasion to visit the part of the building where the opening was. It is not the same thing to say that a lack of due and proper superintendence may be inferred from leaving in the same position for two or three days iron beams so placed near such an opening, which workmen were expected to use, that one of them would be liable from a slight inadvertent push of the foot of a passer by to fall through the hole, as to say that such a lack may be inferred from leaving a ledge stone upon a staging used in building one of the walls of a church, the floors of which were not in and the roof of which was not on.

We do not think, in the absence of evidence that the stone had been so placed by any specific order of the foreman, or that he had had occasion to visit that part of the work while the stone was there or had actual knowledge that the stone was left upon the staging, and in view of the fact that how much of the stone projected could only be seen from above, that the mere fact that a stone had been left for two or three days with such a considerable portion of it projecting beyond the staging as to make it liable to fall if it should be hit, or if the staging should be jarred in the prosecution of the work, would justify a finding that the foreman was negligent in exercising superintendence.

This view of the case makes it unnecessary to consider whether the evidence shows that the plaintiff was himself in the exercise of ordinary care in placing himself where he did.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN L. WALKER.

Middlesex. January 28, 1895. — March 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Habitual Criminal — Misjoinder of Counts of Indictment — Rejection of Unnecessary Words as Surplusage — Parol Evidence.

A motion to quash an indictment on the ground that it should not contain allegations of former convictions and sentences of the defendant, with a view to proving that he was an habitual criminal, is rightly overruled, as such allegations, under St. 1887, c. 485, § 1, are not only proper, but necessary.

A motion to quash an indictment on the ground of a misjoinder of counts is rightly overruled if it is obvious that the indictment was intended to charge the defendant in one count with the crime of breaking and entering a building with intent to commit the crime of larceny therein, and with having been twice convicted of crime, sentenced, and committed to prison for terms of not less than three years each, and to charge him in another count with an attempt to commit the same crime, and with having been in like manner previously convicted of crimes and sentenced; and, the meaning being obvious, unnecessary words may be rejected as surplusage.

At the trial of a criminal case on the question whether or not the defendant was married, an officer at the state prison at the time when the defendant was said to have been committed, four years before, testified that it was his duty to ask the prisoners certain questions when they entered the prison, and to keep a record of the answers, and that the defendant said, in answer to a question whether he was married, that he was not married. The defendant objected to the admission of the evidence, on the ground that the record should be produced. *Held*, that the entries did not constitute such a record as precluded parol evidence of the facts stated in them.

INDICTMENT, in two counts, charging the defendant, in the first count, with breaking and entering the dwelling-house of Edward S. Tead in the night-time, with intent to commit larceny, and with being an habitual criminal, four convictions, sentences, and committals to the state prison of this Commonwealth for terms of not less than three years each being set forth in the indictment; and in the second count, with attempting to break and enter in the night-time said dwelling-house with like intent, and with being an habitual criminal, the four convictions, sentences, and committals aforesaid being set forth in the indictment. In the Superior Court, before the jury were impanelled, the defendant moved to quash the indictment for the reasons, 1. that the defendant on his trial on the counts charging him with breaking and entering, and also with attempt-

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ing to break and enter, should not be prejudiced by the alleged record of his previous conviction and sentence on other charges of a similar character; 2. that there was a misjoinder of counts in that the first count charged the defendant with breaking and entering, and the second count with being an habitual criminal; and the third count with attempting to break and enter, and the fourth count with being an habitual criminal. The motion was overruled by *Hopkins*, J., and the defendant excepted.

At the trial in the Superior Court before *Fessenden*, J., the Commonwealth offered in support of the allegations in the indictment as to former convictions of the defendant record evidence, and also parol evidence, as to the identity of the defendant. To the admission of this evidence the defendant objected, but the judge admitted the evidence, and the defendant excepted. No objection was made to the form of the evidence.

It became a material question at the trial whether or not the defendant was married. On this question the Commonwealth presented as a witness one Seavey, who testified that he was an officer at the state prison at the time when the defendant was said to have been committed in 1890; that it was his duty to ask the prisoners certain questions when they entered the prison and to keep a record of the answers made, and that a record was kept of the answers made; and that the defendant said, in answer to a question whether he was married, that he was not married. The defendant objected to the admission of this evidence, on the ground that the record kept at the prison should be produced. The judge admitted the evidence, and the defendant excepted.

Proper instructions were given to the jury upon all material facts of the case.

The jury returned a verdict of guilty of so much as charged the attempt to break and enter and the former convictions, and not guilty of so much as charged the breaking and entering; and the defendant alleged exceptions.

J. L. O'Neill, for the defendant.

F. N. Wier, District Attorney, for the Commonwealth.

KNOWLTON, J. 1. The first motion to quash, on the ground that the indictment should not contain allegations of former convictions and sentences of the defendant with a view to proving that he was an habitual criminal was rightly overruled.

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Such allegations in an indictment under St. 1887, c. 435, § 1, are not only proper, but necessary. All the questions involved in this objection to the indictment have heretofore been decided against the defendant. *Tuttle* v. *Commonwealth*, 2 Gray, 505. *Commonwealth* v. *Harrington*, 130 Mass. 35. *Commonwealth* v. *Graves*, 155 Mass. 163. *Sturtevant* v. *Commonwealth*, 158 Mass. 598.

2. The second motion to quash, on the ground of a misjoinder of counts, has not been argued, although from a reference to it in the brief we infer that it is not waived. The indictment contains two counts, instead of four as assumed by the defendant, and the words "against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided," unnecessarily used in one place in each of the counts, and the words, "And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present," do not in this case denote the end of one count and the beginning of another. The decisions in *Commonwealth* v. *Glover*, 111 Mass. 395, 400, *Commonwealth* v. *Cohen*, 120 Mass. 198, and *Commonwealth* v. *Chiovaro*, 129 Mass. 489, hold that the unnecessary use of these words under circumstances like the present is not fatal to the indictment. It is obvious, upon examination of the indictment, that it was intended to charge the defendant in one count with the crime of breaking and entering a building with intent to commit the crime of larceny therein, and with having been twice convicted of crime, sentenced, and committed to prison for terms of not less than three years each, and to charge him in another count with an attempt to commit the same crime, and with having been in like manner previously convicted of crimes and sentenced. The meaning being obvious, unnecessary words may be rejected as surplusage.

3. The testimony of what the defendant said in answer to the question whether he was married or single was rightly admitted. The fact that the officer to whom he made the answer made a record of certain facts, including this answer, in accordance with a custom to make what may be called a descriptive list for possible future use when receiving a person into prison as a convict, does not affect the competency of the oral testimony. The entries do not constitute such a record as precludes parol evidence of the facts stated in them. *Exceptions overruled.*

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THOMAS B. F. BOLAND *vs.* ST. JOHN'S SCHOOLS & another.

Worcester. October 2, 1894. — March 2, 1895.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Way — Deed — Reservation — Injunction — Damages.

A., who owned land upon a public street, erected thereon a long wooden block of tenements facing on the street, and, in the rear and south of the block, several houses, and laid out a driveway running east and west between the rear of the block and the front of the houses, and also passageways at the east and west ends of the block leading from the driveway to the street. These ways were intended by A. as passageways or driveways to and from the street, and were in actual use by owners, tenants, and others having occasion so to use them, when A. conveyed one of the houses to B., by a deed which bounded the land in part as "running north . . . to a driveway, thence easterly on said driveway," and which also contained the following reservation: "Reserving that the said driveway between said houses as now laid out shall remain open and common to all parties having right to enter therein." B., when he took his deed, gave back to A. a mortgage which contained the same description and reservation as in the deed. A. then conveyed the block above mentioned to C. by a deed describing the land in part as "running south . . . to a driveway running in rear of said lot to be conveyed; thence turning by said driveway east . . . to a driveway, . . . reserving hereby all rights of passage as now laid out in the driveways and passageways connected with said premises, and the same are never to be closed or obstructed while said premises remain as now laid out, except the parties now or hereafter owning the surrounding premises mutually agree to alter and rearrange the same." The mortgage given by B. to A. was subsequently foreclosed by D., the son of, and acting as agent for, A., who made to D. a mortgagee's deed, under the power of sale contained in the mortgage, of the entire premises described in B.'s deed; and afterwards D., by A.'s direction, conveyed a portion of the premises to his brother, and another portion to his father, retaining the balance in himself. *Held*, that it would seem that B. took to the centre of the driveway in fee, with a right of way over the other half, the half belonging to him being subject to a similar right of way on the part of all persons having the right to enter upon the driveway; but that, if this were not so, there passed, as appurtenant to the premises conveyed to B., an implied right to use the ways, and that this appertained to every portion of the premises so conveyed. *Held, also*, that a subsequent grantee of C.'s land had no right, under the reservation in C.'s deed, as against D., to close up the driveway in the rear and the passageway at one end of the block without D.'s consent.

A. acquired, either by grant or as appurtenant to his land, a right of way over a driveway to a public street. B., who owned land abutting on the way, obstructed a part of the way by the erection of a fence. A. thereupon brought a bill in equity against B. for an injunction and for damages. During its pendency B. erected another fence which wholly obstructed the way. The judge who heard

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the case found that no laches were attributable to A. in bringing the suit, or in asserting his rights; that the fence could be easily removed, and without great or disproportionate injury and loss to B.'s property; and that it was the obvious intention of B. to prevent A. from using the way as originally located, and to appropriate the same to the uses and purposes of his premises, to the permanent exclusion of A. therefrom for use as a passageway from his premises to the street. *Held*, that A. was entitled to a mandatory and perpetual injunction for the removal of the obstructions, and to nominal damages.

BILL IN EQUITY, filed in the Superior Court, against St. John's Schools, a corporation, and Patrick T. O'Reilly, and, O'Reilly having deceased, by amendment, against Thomas D. Beavan, the grantee in a deed from the devisee under and executor of the will of O'Reilly, to establish a way, to obtain the removal of certain obstructions therein, to restrain the erection and maintenance of any such obstructions, and for damages.

The case was heard by *Aldrich*, J., and reported for the determination of this court, in substance as follows.

In 1836, Tobias Boland, the common grantor of the plaintiff and the defendants, owned a tract of land at the corner of two public streets in Worcester, being 130 feet in depth southerly from Temple Street, and 660 feet in length easterly from Green Street, as shown partially on the following plan. In 1868, he erected on his land six houses, a long wooden block consisting of several tenements, which faced on Temple Street, three houses in the rear and south of the long block, one house east of the long block and facing on Temple Street, and one house in the rear and south of the last named house, which was on the lot now owned by the plaintiff. In locating these houses, he left passageways and driveways between the houses as follows: a passageway or driveway in the rear of the long block and between the block and the houses erected in the rear of the same, which was called Boland Court, extending easterly from the east line of the land of one Conneary to the west line of the land of one Dunn; another passageway on the east side of the block extending from Temple Street south to the south line of Boland's land, where it ended and was closed by a fence; another passageway on the west side of the block, extending from Temple Street south to and opening into the passageway in the rear of the block; also two other passageways between the houses erected directly in the rear of the block, which ex-

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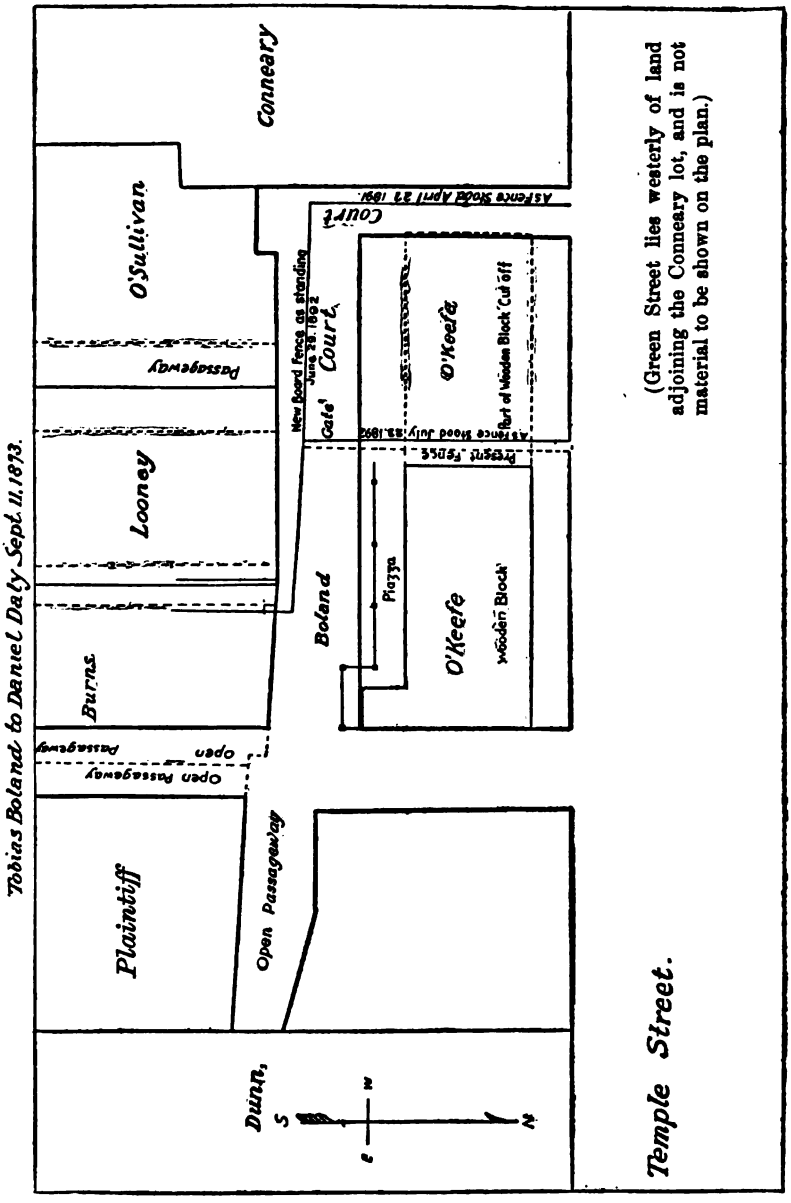

tended from the passageway in the rear of the block south to the south line of Boland's land, where they ended and were enclosed by a fence. All of these passageways were of sufficient width for the passage of teams, were well defined by buildings

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or fences, and were intended by Boland as passageways or driveways to and from Temple Street.

These passageways were open, and in actual use by Boland, his grantees and occupants, from about the year 1868 until the obstruction complained of in the plaintiff's bill. The three houses in the rear of the long block and the plaintiff's house were set facing east and west, so that the entrances to the same were into and upon the passageways running north and south. To what extent the west passageway and that part of the passageway obstructed by the defendants, running east and west, was used by the plaintiff and his tenants, and the plaintiff's grantors and their tenants, under a claim of right, is uncertain and indefinite; but all of the passageways were open, unobstructed, and used by teams and as footways by tenants, owners, and others having occasion to enter the same, from the time of the original laying out to the time of the obstruction by the defendants in 1889; and the plaintiff and his tenants and the plaintiff's grantors and their tenants have, from the laying out of the driveways to the time of the obstruction, used the west driveway, and that part of the driveway in the rear of the long block which has been obstructed by the defendants, for entrance to and exit from the plaintiff's lot and house, to some extent, and whenever they chose so to do. In 1889, the authorized agents of the defendant St. John's Schools, and the authorized agent of the defendant O'Reilly, (from whom the defendant Beavan derives title,) enclosed a portion of the west passageway extending southerly from Temple Street over the O'Keefe lot by a fence running from a point in the southerly line of Temple Street six feet and two inches west of the face of the long block to nearly the north line of the O'Sullivan lot, leaving a footway six feet and two inches wide between the block and the fence, cleared away the buildings on the Conneary lot, and made all of that lot and the part of the way so enclosed west of the fence a part of the yard in front of the school building of the St. John's Schools previously erected on the lots in the rear. The plaintiff thereupon began this suit. While the suit has been pending, the defendants have torn down nearly one half of the long block, namely, the westerly half, and erected a second fence extending from a point in the south line of Temple Street about

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five feet west of and parallel to the face of the long block, as shortened, to a point in the north line of land in the rear of the block conveyed by Boland to Daniel Daley on September 11, 1873, cleared away the buildings from the Looney lot and the O'Sullivan lot, and made the land and the part of Boland Court west of the fence part of the yard in front of the school building. Upon the shortening of the long block and the erection of a fence west of the same, the first fence, which was erected in the passageway, was removed. This second fence was of pickets, which was supplanted by a high board fence running from Temple Street nearly to the centre of the passageway in the rear, through which it extended, thence easterly about forty feet, and thence southerly, effectually excluding the plaintiff from the use of so much of the rear passageway running east and west as lies westerly of the fence, and excluding him from the use of the west passageway to Temple Street, and enclosing all the land west of the fence as part of the property of the defendant St. John's Schools. The fence, as now erected, is designed to be a permanent structure, enclosing the yard and premises of St. John's Schools, and, while the fence can be easily removed and without great or disproportionate injury and loss to the defendants' property, it is the obvious intention of the defendants to prevent the plaintiff from using said west passageway as originally located, and to appropriate the same to the uses and purposes of the St. John's Schools, to the permanent exclusion of the plaintiff therefrom for use as a passageway from his premises to Temple Street. No laches is attributable to the plaintiff in the bringing of this suit, or in any claim of right as against the defendants. The long block referred to was upon the lot conveyed by Boland to one O'Keefe on January 28, 1874, and extended from Temple Street southerly to the driveway in the rear of it, and from the east to the west driveways above mentioned. A part of the description in the deed from Boland to O'Keefe was as follows: "Thence running south fifty-one feet, more or less, to a driveway running in rear of said lot to be conveyed; thence turning by said driveway east one hundred and twenty-one feet, more or less, to a driveway"; and the deed also contained the following: "Reserving hereby all rights of passage as now laid out in the

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driveways and passageways connected with said premises, and the same are never to be closed or obstructed while said premises remain as now laid out, except the parties now or hereafter owning the surrounding premises mutually agree to alter and rearrange the same." The defendant Beavan became the owner of the O'Keefe lot through mesne conveyances, and now owns the same; and the defendant St. John's Schools owns the lots and buildings thereon west of that passageway which is east of the long block running from Temple Street southerly to the rear boundary of the land originally owned by Boland, except the O'Keefe lot. These obstructions of the passageways around the long block were made without the consent of Boland, unless such consent is implied by the deed to O'Keefe, the conveyances in the case, and the establishment of the passageway east of the long block extending from Temple Street southerly to the rear line of the land originally owned by Boland. The plaintiff's lot is a portion of the land conveyed by Boland to Daley above mentioned, and mortgaged the same day by Daley to Boland. The deed from Boland to Daley contained the following description in part: "Thence running north sixty feet, more or less, by land of John P. Sullivan to a driveway, thence easterly on said driveway one hundred and fifty-four feet, more or less, to land of said Dunn," at a point on whose land the lot commenced. The deed also contained the following reservation: "Reserving that the said driveway between said houses as now laid out shall remain open and common to all parties having right to enter thereon." The mortgage from Daley to Boland contained the same description and reservation as in the deed to him above described. Daley being unable to pay the amount due on the mortgage, the same was foreclosed by Boland in the following manner. Boland gave to his son, the plaintiff, a written power of attorney to make an entry under the mortgage for the purpose of foreclosing the same; and, in pursuance thereof, the plaintiff on April 25, 1877, made an entry upon the land, as agent and attorney of his father, for the purpose of foreclosing the mortgage, and recorded a certificate to that effect.

On March 30, 1877, the premises described in the mortgage were advertised for sale under the power given in the mortgage. At the time of the commencement of the foreclosure, it was

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agreed and stipulated between Boland and the plaintiff that the Daley land should be sold by auction under the power given in the mortgage; that the plaintiff should purchase it at the auction sale in behalf of his father, and take a conveyance thereof to himself, and thereby foreclose the mortgage; and that, after the mortgage was foreclosed by such sale, the plaintiff should reconvey to his father one of the three lots, and should convey to John A. Boland, his brother, one of the lots, and that the third lot should be retained by the plaintiff.

In pursuance of this agreement the Daley land was sold by public auction under the power in the mortgage, on April 30, 1877, and the same was bid off by and conveyed to the plaintiff by deed, under the power in the usual form, without any consideration passing from the plaintiff to his father. The mortgage contained no agreement that the premises might be purchased by the mortgagee, or any one in his behalf.

In further pursuance of the agreement between Boland and the plaintiff, the latter, on May 21, 1877, conveyed the westerly house and lot of the Daley land to his father, and the middle house and lot to his brother, John A. Boland, and the third lot, namely, the easterly house and land, was retained by the plaintiff, and has ever since been owned by him, and is the lot of land to which he claims a right of way as appurtenant. In the foreclosure of the Daley mortgage, the plaintiff acted as the agent and attorney of his father, and the plaintiff, although the nominal owner, had no right in the property as against his father. After the foreclosure, the conveyances above recited were made by direction of Tobias Boland, it being his intention to give the two lots to his sons, and to confirm in the plaintiff the title to the third lot.

The purchase of the Burns, Looney, O'Sullivan, and Conneary lots, the erection of the school buildings, the erection of all the fences enclosing the schoolhouse yard, and the cutting off of the west part of the long block, were all acts authorized by the defendants; and the fences complained of are maintained by authority of and with the consent of the defendant Beavan, for the benefit of the St. John's Schools, and were erected and are now maintained by the defendants, under a claim of right. The driveway from Temple Street to the plaintiff's

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house and lot over and through the east driveway, running from Temple Street south past the plaintiff's front door, is a straight way, twenty feet wide, furnishing ample facilities to the plaintiff for ingress and egress from Temple Street; and the plaintiff claims a right of way over and in the west passageway and the driveway running east and west in the rear of the long block, which were obstructed by the defendants, as appurtenant to the grant from Tobias Boland to Daley, and to his land as parcel of the grant. By the obstructions complained of, the plaintiff's estate has been damaged in the sum of $400.

If the plaintiff had a right of way, as contended, and the defendants were not required to remove the obstructions complained of, judgment was to be entered for the plaintiff in the sum of $400; but if the plaintiff was entitled to a mandatory order and perpetual injunction for the removal of the obstructions, he was to be awarded nominal damages additional to such order and injunction.

R. Hoar, for the defendants.

C. A. Merrill, for the plaintiff.

MORTON, J. The premises conveyed by Tobias Boland to Daniel Daley on September 11, 1873, were bounded in part as follows: "thence running north sixty feet, more or less, by land of John P. Sullivan to a driveway, thence easterly on said drive way one hundred and fifty-four feet, more or less, to land of said Dunn." The driveway thus referred to was manifestly the one running east and west in the rear of the long block. No other answers to the distance. The deed also contained a reservation referring to this driveway, and "Reserving that the said driveway between said houses as now laid out shall remain open and common to all parties having right to enter thereon." It would seem, therefore, that Daley took to the centre of the driveway in fee with a right of way over the other half, the half belonging to him being subject to a similar right of way on the part of all parties having the right to enter upon the driveway. *Fisher* v. *Smith*, 9 Gray, 441. *Boston* v. *Richardson*, 13 Allen, 146, 153, 154. *White* v. *Godfrey*, 97 Mass. 472, 474. *Stark* v. *Coffin*, 105 Mass. 328, 330. But if this were not so, inasmuch as it appears that this driveway and the passageways at the east and west ends of the long block were laid out by Tobias Boland

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when he built the long block and the other buildings in 1868, and were intended by him, as the report finds, as passageways or driveways to and from Temple Street, and were in actual use by owners, tenants, and others having occasion to pass and repass at the date of Daley's deed, we think that there passed as appurtenant to the premises conveyed to Daley an implied right to use them, and that this right appertained to every portion of the premises so conveyed. *Lefavour* v. *McNulty*, 158 Mass. 413. *Regan* v. *Boston Gas Light Co.* 137 Mass. 37. *Goss* v. *Calhane*, 113 Mass. 423. *Fox* v. *Union Sugar Refinery*, 109 Mass. 292. *O'Linda* v. *Lothrop*, 21 Pick. 292. It follows then that the plaintiff has a right of way over the driveway and the passageways, unless it has been extinguished by something which occurred when the Daley deed was given or has taken place since.

It appears that at the time when Daley took his deed he gave back to Tobias Boland a mortgage which contained the same description and reservation as the deed. This mortgage was foreclosed in 1877 by the plaintiff, acting as agent for and on behalf of Tobias Boland, who made to the plaintiff a mortgagee's deed under the power of sale contained in the mortgage of the entire premises described in the Daley deed, including those now belonging to the plaintiff. Subsequent to this the plaintiff, by direction of Tobias Boland, conveyed to John A. Boland a portion of the Daley premises, and to himself, the said Tobias, another portion. There was thus left in the plaintiff the premises now owned by him, and which have never been conveyed to him by any other deed than the one made to him by Tobias Boland as mortgagee under the Daley mortgage. Subsequent to the Daley deed, and prior to the foreclosure of the mortgage, Tobias Boland conveyed to one O'Keefe the long block aforesaid. A part of the description contained in said deed is as follows: "thence running south fifty-one feet, more or less, to a driveway running in rear of said lot to be conveyed; thence turning by said driveway east one hundred and twenty-one feet, more or less, to a driveway, . . . reserving hereby all rights of passage as now laid out in the driveways and passageways connected with said premises, and the same are never to be closed or obstructed while said premises remain as now laid out, except the parties now or hereafter owning the surround-

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ing premises mutually agree to alter and rearrange the same." The driveway referred to is the same as in the Daley deed, and it would seem that under this description the grantee, as in the Daley deed, took to the centre of the driveway and passageways, with a right of way over the remaining half, and subject to a similar right on the part of others abutting on the way over the half belonging to him.

The defendants contend that the plaintiff stands in the same position which he would have occupied if the title to the Daley premises had actually vested in Tobias Boland under the foreclosure proceedings, and a deed had then been made by Tobias to the plaintiff of the premises which he now owns. And they insist that in that event the plaintiff would have taken subject to the reservation contained in the O'Keefe deed, and that under that reservation they have the right to close up the passageway and driveway as they have done, because they now own all the surrounding premises.

We do not think that this contention can avail the defendants. The reservation in the O'Keefe deed could not diminish any rights which were appurtenant to the Daley premises at the time of the execution of the deed to O'Keefe; and, as we have already seen, a right of way over the driveway and passageways was appurtenant to every part of the Daley premises. If, therefore, the title to the Daley premises had vested under the foreclosure proceedings directly in Tobias, and he had thereupon conveyed to the plaintiff the premises now belonging to him, there would have passed as appurtenant to them a right of way over the passageways and driveway. The title of Tobias would have been acquired under the mortgage, and he would have taken the premises with the same rights and subject to the same easements to which they were entitled and subject when Daley held them. This would be equally true whether Daley and O'Keefe took to the centre or the sides of the driveway.

But, further, we think that the Daley premises, and every part of them, fairly may be included in the description of "surrounding premises" contained in the reservation in the O'Keefe deed, and that the defendants therefore, as owners of the O'Keefe premises, had no right, as against the plaintiff, to close up the driveway and passageway without obtaining his consent, which they have not done.

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We doubt whether the foreclosure proceedings are to be regarded as having vested the title to the plaintiff's premises in Tobias Boland. It is true that the plaintiff acted as the agent of his father in foreclosing the mortgage. But it was understood from the first that these premises were to be his. And he derived his title to them, not from his father directly, but through his father as mortgagee, and held them as his own all the time.

The remaining question is whether the plaintiff is entitled to a removal of the obstructions, and we are of opinion that he is. The defendant St. John's Schools and the original defendant O'Reilly proceeded in plain violation of the plaintiff's rights. The first fences that were built obstructed a part of the west passageway and of the driveway in the rear of the long block. Thereupon the plaintiff brought this bill for an injunction, and for damages. During its pendency the defendants erected another fence which wholly obstructed the west passageway and the westerly portion of the driveway.

The report expressly finds that no laches are attributable to the plaintiff in bringing this suit, or in asserting his rights. It also finds that the "fence can be easily removed, and without great or disproportionate injury and loss to the defendants' property," and that "it is the obvious intention of the defendants to prevent the plaintiff from using said west passageway as originally located, and to appropriate the same to the uses and purposes of the St. John's Schools, to the permanent exclusion of the plaintiff therefrom for use as a passageway from his premises to Temple Street." The case comes therefore clearly within the principles laid down by this court in *Lynch* v. *Union Institution for Savings*, 159 Mass. 306, 308, as governing the issue of mandatory injunctions. See also same case, 158 Mass. 394; *Starkie* v. *Richmond*, 155 Mass. 188; *Attorney General* v. *Algonquin Club*, 153 Mass. 447, 454; *Tucker* v. *Howard*, 128 Mass. 361; *Linzee* v. *Mixer*, 101 Mass. 512.

Perpetual injunction to issue for removal of obstructions and nominal damages to be assessed.

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MARY A. HUSE & another *vs.* AMESBURY BOARD OF HEALTH.

Essex. November 7, 1894. — March 2, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Private Drain in Private Way — Authority of Board of Health — Statute.

Where a nuisance is artificially created by emptying the sewage of dwelling-houses through a private drain in a private way upon abutting private land, there is no right in the board of health of the town to extend the private drain through such private land to a brook thereon, and to clean out the brook that it may be used to carry off the sewage.

FIELD, C. J. This is a petition, by Mary A. Huse and Sarah E. Ross, to the Superior Court, under St. 1887, c. 338, § 2, and is in the nature of an appeal from an order of the respondents, as the board of health of the town of Amesbury, that a certain nuisance be abated by extending a private sewer from its present terminus on Huntington Avenue through the land of the petitioners to a brook, and by entering upon said land for the purpose of cleaning out the brook. It is agreed that "Huntington Avenue is a private way on which live some sixteen families; that a private sewer runs through this way, which sewer was used and owned by said families only, and which on the day of the petition to [the] board of health discharged at the easterly end of said avenue, and the outflow spread out on the surface of the way and abutting private land, soaking into the ground and standing in a pool of considerable size and [of] offensive smell, constituting a nuisance," etc., and that "the entry upon lands of Mary A. Huse and Sarah E. Ross, which was ordered by the board of health, was for the purpose of cleaning the brook, which runs through their land a distance of some two hundred yards, in order that the sewage might flow into and along the brook. The distance from the present terminus of the sewer to the brook upon [the] land of petitioners, to which brook it was ordered that the sewer be continued, is some thirty feet." The original petition to the board of health, signed by the petitioners in this case and by five other persons, is as follows:

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"To the Board of Health of Amesbury: Gentlemen, — The undersigned, injuriously affected thereby, complain that a nuisance exists at the easterly end of Huntington Avenue, so called, a private way in Amesbury leading easterly from Elm Street, arising from the outflow of sewage from a sewer laid in said private way, which sewer is not sufficiently and properly provided with means for the disposal of the sewage drained into and flowing through the same, whereby said sewer and the outflow thereof have become and are a public nuisance, dangerous to the public health. You are requested to cause a discontinuance of said sewer and the use thereof for purposes of drainage, and to abate said nuisance."

It appears that the board of health, in ordering this nuisance to be abated, acted under Pub. Sts. c. 80, § 28 *et seq.*

It is plain that the nuisance in this case was artificially created by emptying the sewage of dwelling-houses through a private drain upon the land of somebody. We know of no right in the board of health to extend this private drain through the land of the petitioners to a brook on their land, and to clean out the brook that it might be used to carry off the sewage. Such a nuisance may be dealt with by the board under Pub. Sts. c. 80, §§ 18–25; or the proper authorities may lay a public sewer with which the board may require the buildings on the private way to be connected. Sts. 1889, c. 108; 1890, c. 132; 1893, c. 460. The nuisance described, we think, was not, under the facts shown in the bill of exceptions, within Pub. Sts. c. 80, § 28. See *Grace* v. *Newton Board of Health*, 135 Mass. 490, 495.

Exceptions sustained.

T. H. Hoyt, for the petitioners.

H. I. Bartlett, (*J. T. Choate* with him,) for the respondents.

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LORING LOKER *vs.* JAMES L. CAMPBELL & another.

Middlesex. November 20, 1894. — March 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Libel — Publication — Question for Jury as to Construction of Article — Allegation of Justification — Evidence in Rebuttal.

At the trial of an action for libel for the publication of an article charging a person with unnecessarily failing to provide his cattle with proper shelter and protection from the weather, within the meaning of Pub. Sts. c. 207, § 52, the judge declined to rule that the article was not actionable, and submitted to the jury the questions whether it was fairly to be understood as charging the plaintiff with cruel treatment of his cows by unnecessarily failing to provide them with sufficient shelter or protection from the weather, and whether it also referred to and charged cruel treatment by failing to furnish sufficient shelter during the winter preceding the date of the libel. *Held*, that the refusal to rule, as matter of law, that the publication was not actionable, was right, that the ruling submitting to the jury the construction of the article was sufficiently favorable to the defendant, and, further, that the court was inclined to think that the judge could have ruled as matter of law that the publication was libellous.

In an action for libel for the publication of an article charging a person with unnecessarily failing to provide his cattle with proper shelter from the weather, the defendant in his answer alleged in justification that the publication was true, and introduced evidence to show the condition of the plaintiff's barn upon the day when the article was published, in that it contained cracks in the boarding. The plaintiff, in rebuttal, offered testimony to show that from the early fall to March 1st, on the 23d day of which month the article was published, the cracks were covered up with hay so that the wind and cold did not penetrate the barn. The judge instructed the jury that such evidence would not be competent, unless they found that the libel covered the said period previous to the publication, and the defendant excepted. Witnesses for the defendant having testified that on the date of the libel the barn was cold, the plaintiff, in rebuttal, was allowed to ask certain witnesses who had examined the barn on and about the date of the publication, "State whether or not the barn was cold or warm," each of whom answered that it was warm; and the defendant excepted. *Held*, that the evidence in rebuttal was properly admitted.

TORT, for an alleged libel contained in the following words, published in a newspaper called The Evening Star, on March 23, 1893, in Lowell, which newspaper was owned and published by the defendants: —

"Brutal Treatment of Cows. This morning a Star reporter took a drive out to Chelmsford to see some cattle with Agent Drury of the Humane Society; they went out past the poor

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farm and stopped at the place of Mr. Loker, who keeps or tries to keep ten head of cattle and four horses in a barn that looks like a hencoop, for there is really as much space between the boards as the boards are wide. It is a wonder that the cattle that have been stabled there this winter haven't frozen to death. To-day is not as cold as it has been this winter, but one should jump around rather lively to keep warm in the structure. Mr. Loker explained it all by saying that he built the barn.

"Mr. Loker has peculiar views in regard to the care of cattle. He says they need no better food than hay, and he doesn't believe in giving them anything else, and the cows show the result of that peculiar method, as they are as thin as the stanchions that hold them. Besides this, they are suffering from a mange and from lice. These plagues taken together have eaten the hair and flesh off portions of nearly all of them. Mr. Loker when questioned about this said he knew they had the mange, but he didn't know anything about the lice. The cows and horses that belong to him haven't been cleaned for some time, and this, together with the disease, the exposure and want of food, makes the poor animals suffer terribly.

"Mr. Drury warned Loker that if he didn't clean the animals he would prosecute him. The condition of the cows is such that one can pluck a fistful of hair from them without the cow showing by any action that she has felt it. When this hair was examined it was found thick with lice. One cow has a space on her hip a foot square entirely bare of hair. This is the worst case Mr. Drury has ever seen, and he intends to follow up others of these farmers who maltreat their cattle."

The answer was: 1. A general denial. 2. That the publication was true.

At the trial in the Superior Court, before *Sheldon*, J., the jury returned a verdict for the plaintiff, and the defendants alleged exceptions, in substance as follows.

After the reading of the pleadings and the opening of the case, the defendants requested the judge to rule that the publication was not actionable. The plaintiff contended that the question could be raised only upon demurrer. The judge refused to rule as requested by the defendants, and ruled that the article was not libellous in charging the plaintiff with furnish-

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ing insufficient food, and that he would submit the case to the jury to try whether the article was fairly to be understood as charging the plaintiff with cruel treatment of his cows by unnecessarily failing to provide them with sufficient shelter or protection from the weather, and the further question whether the libel also referred to and charged cruel treatment by failing to furnish sufficient shelter during the winter preceding the date of the libel; and the defendants excepted.

Under the defendants' plea of justification they introduced evidence tending to show the condition of the barn upon the day when the article complained of was published, in that it contained large cracks in its boarding. The plaintiff, in rebuttal, offered testimony tending to show that the cracks in the boarding of the barn prior to the date of the publication complained of, from the early fall to the first day of March, were covered up with hay so that the wind and cold did not penetrate the barn. To the admission of this evidence the defendants objected. The judge overruled their objection and admitted the evidence, instructing the jury that such evidence would not be competent unless they found that the libel covered the period previous to the publication of the article; and to this ruling the defendants also excepted.

Witnesses for the defendants testified that on the date of the libel they visited the barn, and that it was cold. The plaintiff, in rebuttal, was allowed, against the objection of the defendants, to ask certain witnesses who had visited the barn and made an examination on and about the date of the publication, the following question: "State whether or not the barn was cold or warm." Each of the witnesses answered that it was warm. To the admission of these questions and the answers given thereto the defendants also excepted.

W. S. Marshall, for the defendants.

W. H. Bent, for the plaintiff.

FIELD, C. J. The court could not rule, as matter of law, that the publication complained of was not actionable. The ruling submitting to the jury the construction of the article published in the manner shown by the exceptions was sufficiently favorable to the defendants. *Twombly* v. *Monroe*, 136 Mass. 464. We are inclined to think that the court could have ruled, as matter

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of law, that the publication was libellous. It seems to charge the plaintiff with unnecessarily failing to provide his cattle with proper shelter and protection from the weather, within the meaning of Pub. Sts. c. 207, § 52, and has a natural tendency to bring the plaintiff into public hatred and contempt.

The defendants in their answer alleged in justification that the publication was true. Pub. Sts. c. 167, § 80. The testimony offered by the plaintiff in rebuttal of the defendants' evidence under this allegation was properly admitted.

Exceptions overruled.

MELVILLE F. JONES *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. November 21, 1894. — March 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Railroad — Passenger — Negligence — Action.

One who, without the knowledge of any of the trainmen or servants of a railroad corporation, endeavors to get upon a train which has stopped for the purpose of discharging passengers at a station where it is not accustomed to stop for the purpose of receiving them, does not thereby become nor acquire the rights of a passenger, although he has a ticket, and cannot recover damages from the corporation for an injury caused by the sudden starting of the train while he is so endeavoring to get upon it; no negligence on the part of the corporation's servants being shown.

TORT, for personal injuries occasioned to the plaintiff, while attempting to board a train on the defendant's railroad at the Winter Hill station in Somerville, by the alleged negligence of the defendant. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

S. J. Elder & R. Bradford, for the plaintiff.

T. Hunt, for the defendant.

ALLEN, J. The train by the starting of which the plaintiff was hurt was not accustomed to stop at that station for the purpose of receiving passengers, but only for the purpose of leaving

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them in case there were any who wished to stop there; and when it so stopped, persons who wished and were ready to take the train were permitted to do so. The plaintiff had not made it known to anybody in the service of the defendant that he intended to take that train. Indeed, he did not himself intend to take it until, while on his way to the railroad station, he heard it coming; whereupon he ran to catch it, under the mistaken supposition that it was the train which he had intended to take. The train stopped on this occasion to leave passengers; and the plaintiff, arriving just afterwards and having a ticket, attempted to get on board. It was dark. He saw no trainmen or servants of the defendant, and was seen by none of them. The conductor had given the signal for the engineer to start, and the train started just as the plaintiff stepped upon the platform of a car, and he was thrown down and hurt. The verdict shows that the conductor, when he gave the signal, did not know that the plaintiff was getting upon the train, or was intending to get upon it, or was approaching it for that purpose; and also that his failure to know these things was not due to any negligence on his own part, or on the part of the trainmen, or of the defendant in the matter of the trainmen. Under these facts, the plaintiff had not been received or accepted as a passenger, and did not have the rights of a passenger. *Webster* v. *Fitchburg Railroad*, 161 Mass. 298. *Dewire* v. *Boston & Maine Railroad*, 148 Mass. 343. *Merrill* v. *Eastern Railroad*, 139 Mass. 238.

Not being a passenger, the defendant owed to him no duty which it failed to perform. The instructions to the jury were carefully and accurately expressed, and were sufficient.*

Exceptions overruled.

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* The judge instructed the jury that the defendant was under no obligation to hold the train at this station for an instant after such passengers as desired to do so had left it; and further instructed them as follows: "Assuming that you find that there was no contributory negligence on the part of the plaintiff, to maintain this action the plaintiff must prove that the conductor when he gave the signal to start either knew, or would have known had he and the other trainmen used due care, and had the defendant used due care in lighting its premises and providing a suitable number of trainmen, that the plaintiff was then either getting upon the train or that he intended to get upon it, and was approaching it for that purpose, and was so near to it that there was reason to apprehend that, while he was in the act

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CHARLES W. PERKINS & another, executors, *vs.* THOMAS H. E. STEARNS & others.

Suffolk. December 6, 1894. — March 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Will for Instructions — Claims as to which Executors have no Duty to perform — Devise and Legacy — Continuance of Trust — Rights of Life Tenants — Vested Interest in Income.

The claim of legatees as to the disposition to be made of certain property on the happening of a certain event will not be considered under a bill for instructions brought by the executors of the will, if on the claims made the executors have no present duty to perform with respect thereto.

A testator directed by will that his executors should take charge of his estate on S. Street, and that "so much of the income from this S. Street estate as shall be needed for the payment of the taxes of my real estate and the interest on the mortgage upon said S. Street property shall be used for such taxes and interest, until the estate is disposed of by my executors, . . . and any surplus income shall be used by my executors in reducing the mortgage upon this S. Street estate; . . . Said executors are to keep all the said premises in good repair and pay all taxes levied upon the same, and the net income therefrom shall be equally divided between the heirs of my mother, L., and my wife, E." The mortgage having been paid off, there was income from the estate in the hands of the executors. The principal provisions of the will in favor of the wife were for her life, and the will gave the executors no power to dispose of the above mentioned estate. *Held*, that the trust was to continue during the life of E., and that she took one half of the net income.

BILL IN EQUITY, filed December 14, 1893, by the executors of the will of William Stearns, to obtain the instructions of the court as to the construction of the will.

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of getting upon the car, the train then being at rest, and before he was able to complete such act, the train might start and thereby injure the plaintiff. But if, when the signal to start the train was given, the plaintiff was neither getting upon the train, nor appeared to be approaching it for that purpose, there was no negligence on the part of the defendant or its servants, and this action cannot be maintained. Now, going back, you will inquire whether, at the time when the conductor gave the signal, he knew that the plaintiff was in the act of getting upon that train. Suppose he did not know it, ought he to have known it? And he ought to have known it, if in the exercise of due care on the part of himself and the other trainmen, and in the exercise of due care upon the part of the defendant in the matter of trainmen, he would have known it. A negligent ignorance in regard to this matter, so far as its effect is concerned, is tantamount to actual knowledge."

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The case was heard by *Barker*, J., and reserved by him for the consideration of the full court. The facts appear in the opinion.

A. S. Hall, for the plaintiffs, read the papers in the case.

A. E. Clary, for Elizabeth R. Stearns.

H. G. Allen, for Thomas H. E. Stearns and others.

C. J. Rolfe, for Elmer K. Stearns.

FIELD, C. J. The questions on which the plaintiffs as executors of the will of William Stearns are entitled at the present time to receive instructions relate to the performance of their duties under the seventh article of the will. The heirs of the testator's mother living at the time of his death were two brothers and three sisters of the testator, and these were also the testator's heirs at law. The only other heir at law of the testator was Elmer K. Stearns, a half brother, not a child of the testator's mother. The first article of the will provided for the payment of the testator's debts and the funeral charges. The second article gave certain real estate to his sister Elizabeth B. Willis to hold to her and her heirs and assigns forever. The third article gave to his sister Althea H. Buffum certain other real estate to hold to her sole and separate use during her natural life, and it is provided that "as soon as possible after my decease said land shall be sold to the best advantage by my executors, and the income from the sale of said lands, or such portion of the principal as may be necessary for the support of my said sister Althea H. Buffum, shall be used for her benefit, and at her decease the amount of principal or income remaining shall succeed equally to the heirs of my mother, Lydia P. Stearns."

The fourth article gave to his sister Elizabeth B. Willis, Samuel B. Willis, her son, and his sister Althea H. Buffum, jointly, certain real estate "on condition that they keep the same in good order and repair, and pay all taxes levied thereon." The devise is "to them solely, and no one else shall have any right to control or occupy either of the herein named premises without the written consent of the said Elizabeth B. Willis and Althea H. Buffum, and at the decease of my said sisters the land and buildings thereon, herein named, shall succeed to and become the property of the heirs of my said mother, Lydia P. Stearns."

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The fifth article gave to the testator's wife and to five persons whom we take to be the testator's brothers and sisters, not including his half brother, certain real estate, and the last clause of the article is as follows: "All of said lands to be sold to the best advantage by my executors, and the proceeds to be equally divided between the persons named in this Item 5 (five) for their benefit, they severally to have and to hold the same to them and their heirs forever."

The sixth article gave to his wife certain real estate "to hold the same to her sole use and behoof during her natural life, . . . the same to be kept in good repair and the taxes paid thereon by my said wife," and it was provided that "at the decease of my said wife, Elizabeth R., the estates herein named shall succeed equally to the heirs of my said mother, Lydia P. Stearns."

The seventh article is as follows: "Item 7. I hereby order and direct that my executors hereinafter named shall take charge of my estates situated at No. eighty-eight (88) and ninety (90) on Salem Street, as the street is now numbered, the same being a brick house and store; (so much of the income from this Salem Street estate as shall be needed for the payment of the taxes of my real estate and the interest on the mortgage upon said Salem Street property shall be used for such taxes and interest, until the estate is disposed of by my executors named herein, and any surplus income shall be used by my executors in reducing the mortgage upon this Salem Street estate;) also Nos. two (2), four (4), and six (6) on North Margin Street, as the street is now numbered, all in the city of Boston, county of Suffolk and State of Massachusetts. Said executors are to keep all the said premises in good repair and pay all taxes levied upon the same, and the net income therefrom shall be equally divided between the heirs of my mother, Lydia P. Stearns, and my said wife, Elizabeth R. Stearns."

The eighth article gives to the town of Topsfield, at the death of the testator's wife, five hundred dollars, etc.

The ninth article cancels all claims which the testator held against his brothers and sisters.

The tenth article gives all the rest and residue of the testator's real and personal estate not before appropriated in the will, and

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"after the legacies hereinbefore named have been paid in full," to his wife to hold to her sole use during her natural life, "and at her decease the same shall be equally divided between the heirs of my said mother, Lydia P. Stearns, to be in equal portion to each and all of them."

The eleventh article empowered his executors to sell any and all his real estate excepting that described in the sixth and seventh articles "within five years from the date of my decease, or whenever a majority of the legatees hereinbefore named may wish to realize from the income thereof, and avoid paying taxes thereon."

The twelfth article gave to Annie E. Boyd the sum of thirty dollars annually during her life, to be paid by the executors, "and to be taken from any income from my estate in their hands."

The will concludes with the appointment of the executors.

It is alleged in the bill, and not denied in the answers, that the real estate mentioned in the seventh article as numbered 88 and 90 on Salem Street and 2, 4, and 6 on North Margin Street in Boston was "one property or estate bounded upon said two streets"; that the mortgage on this estate has been paid off, and that there is now an income from said estate in the hands of the executors. The widow of the testator is still alive, and her claim is that this real estate is held in trust by the executors, and that she is entitled to one half of the net income of this real property so long as it is held in trust; that the trust was to continue only until the mortgage had been paid off from the income; and that, as the mortgage has been paid off, she holds the property, or that it should be conveyed to her to hold, for her natural life, under the tenth article of the will. The claim of the brothers and sisters of the testator and the representatives of those who have deceased since the testator's death is that the widow of the testator is entitled during her life to one sixth part of the net income of said property, and that the trust is to continue during her life. The claim of the brothers and sisters as to the disposition to be made of this property on the death of the widow, as well as the claim of the testator's half brother as to his interest in this property on the happening of that event, cannot now be considered under a bill for instructions, as on

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the claims made the plaintiffs have no present duty to perform with respect to these claims.

It appears that all of the property given by the will to the wife of the testator is given to her for her life, except the share given by the fifth article, which is given absolutely; and that all of the property given to her for her life is on her decease given to the heirs of the mother of the testator. But for the parenthetical clause contained in the seventh article, there could, we think, be no question that the executors were to divide the net income from the property equally between the heirs of the testator's mother and his wife so long as the wife should live. As the word "heirs" represents a class, there is no natural termination to the existence of the class. But a gift of income of real property to a particular person, when the property is put in the hands of executors or trustees to manage, without any limitation of time, for the purpose of keeping the property in good repair, paying the taxes thereon, and paying over the net income to such person, would naturally be considered as a gift of income to such person for his life. The principal provisions of the will in favor of the wife are for the use of property during her life. The only words in the parenthetical clause which occasion any doubt that the testator intended that the income should be divided between the heirs of his mother and his wife during her life are the words "until the estate is disposed of by my executors named herein." But the will gives no power to the executors to dispose of the estate mentioned in this seventh article. This estate is excepted from the authority to sell real estate given to the executors by the eleventh article, and is not included in the authority to sell real estate found in the other articles of the will. We do not know what the words which we have quoted were intended to mean. We certainly cannot say that it was intended by them to cut down the right of the widow and heirs of the mother of the testator to receive the income during the life of the widow. We think that the trust, as it is called, is to continue during the life of the widow. See *Blake* v. *Dexter*, 12 Cush. 559.

The next question is, Does the widow take one sixth or one half of the net income? We think that she takes one half. The bequest of income is to the heirs of the testator's mother as

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a class. *Holbrook* v. *Harrington*, 16 Gray, 102. *Leland* v. *Adams*, 12 Allen, 286. *Balcom* v. *Haynes*, 14 Allen, 204. *Bassett* v. *Granger*, 100 Mass. 348. *Haskell* v. *Sargent*, 113 Mass. 341.

The question has not been argued whether the heirs of the testator's mother living at the time of the testator's death took vested interests in the income during the continuance of the trust. They were all of the same degree of relationship to the mother, being her children. We understand that it is conceded that if the heirs as a class took one half of the income, each heir living at the time of the testator's death took one fifth of one half, and that this vested at the time of the testator's death, and that, if any of these heirs has died since the death of the testator, his or her share of the income belongs to his or her estate, and is to be paid to his or her personal representatives.

Decree accordingly.

STEEL EDGE STAMPING AND RETINNING COMPANY & others *vs.* MANCHESTER SAVINGS BANK.

Norfolk. December 6, 7, 1894. — March 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Insolvent Debtor — Corporation — Statute — Laches — Assignment of Property for Benefit of Particular Creditors — "Fraudulent Conveyance."

Proceedings in insolvency against a corporation, under Pub. Sts. c. 157, § 136, are not required to be begun within ninety days from the act relied on, as provided by § 112 in the case of similar proceedings against a person.

A delay of nearly six months in beginning proceedings in insolvency against a corporation, under Pub. Sts. c. 157, § 136, based upon an assignment by the corporation of all its property for the benefit of particular creditors as a fraudulent conveyance, when the creditor "had full knowledge that the assignees were working in good faith" under the assignment, is not, in the absence of special circumstances and of statutory limitation, laches as matter of law.

An assignment of all its property by a corporation for the benefit of such creditors as shall execute the instrument within thirty days from its date, or within such further time, if any, as the trustees shall allow, is a "fraudulent conveyance," within the meaning of Pub. Sts. c. 157, § 136, and a sufficient foundation for insolvency proceedings against the corporation.

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HOLMES, J. This is a bill in equity, under Pub. Sts. c. 157, § 15, seeking to stay proceedings in insolvency which have been begun against the plaintiff by the defendant, under Pub. Sts. c. 157, § 136. It is not denied that § 136 is made applicable to the plaintiff, a foreign corporation, by St. 1890, c. 321, § 1, but it is objected that § 136 by implication incorporates the restriction of § 112, and requires the proceedings against a corporation to be begun within ninety days from the fraudulent conveyance or other act relied on, as in the case of proceedings against a person under § 112, amended St. 1894, c. 261. The argument is that § 136, corresponding to Gen. Sts. c. 118, § 122, St. 1851, c. 327, § 17, legislation of later origin than that embodied in § 112, (Gen. Sts. c. 118, § 103, St. 1838, c. 163, § 19, etc.,) simply enlarges the class subject to the above proceedings dealt with in § 112, and therefore must be taken to adopt the general limitation of time contained in § 112.

The force of such an argument must depend very much on the form of the later legislation. When, by St. 1844, c. 178, § 9, "in addition to the several causes for proceeding against an insolvent debtor enumerated" in St. 1838, c. 163, § 19, other causes were established, the court had no doubt that the ninety days' limitation in the earlier act applied to the later statute, although not repeated. *Bates* v. *Chapin*, 8 Cush. 99. But the section of the act of 1851 from which, as we have said, § 136 is derived, has no such reference to the earlier provisions with regard to persons, but on its face seems to be a complete independent enactment for corporations. The same thing is true of the act taken as a whole. It is assumed by the statute that the existing laws do not apply to corporations, notwithstanding the provision in Rev. Sts. c. 2, § 6, cl. 13, that the word "person" may extend and be applied to bodies corporate, (Pub. Sts. c. 3, § 3, cl. 16,) and the act is so full as to shut out any general argument for its construction based on a contrary assumption. See *Dearborn* v. *Ames*, 8 Gray, 1, 10, 11. *Coburn* v. *Boston Papier Maché Manuf. Co.* 10 Gray, 243, 244. We are of opinion that it would be stretching the law too far to read the ninety days' limitation into § 136.

The further allegation in the bill, that the defendant was "guilty of laches in waiting nearly six months before filing said

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petition, when it had full knowledge that the assignees were working in good faith" under the assignment to them, is not pressed. It falls with the objection which we have considered. The allegation means that a delay of nearly but less than six months with the knowledge alleged is laches as matter of law. But in the absence of special circumstances and of statutory limitation the defendant had a right to wait. To hold otherwise would be to repeal the statute *pro tanto*.

The only other objection to the proceedings taken by the bill is, that the assignment by the plaintiff on which the proceedings were based was not a fraudulent conveyance, within the meaning of § 136. The assignment was a conveyance of all its property by the plaintiff for the benefit of such creditors as should execute the instrument within thirty days from its date, or within such further time, if any, as the trustees should allow. We regard it as settled that such an assignment may be avoided by an assignee in insolvency as a preference, and for the reasons stated by Shaw, C. J., in *Wyles* v. *Beals*, 1 Gray, 233. *White* v. *Hill*, 148 Mass. 396. *Sawyer* v. *Levy*, 162 Mass. 190. *Bartlett* v. *Bramhall*, 3 Gray, 257. See *In re Union Pacific Railroad*, 10 Nat. Bankr. Reg. 178; *Barnes* v. *Rettew*, 8 Phila. 133; *Globe Ins. Co.* v. *Cleveland Ins. Co.* 14 Nat. Bankr. Reg. 311. The law was not changed by St. 1887, c. 340, § 1. That statute, while it makes certain acts of the trustees under such an assignment valid in certain cases, presupposes that the assignment may be voidable, and may be set aside by assignees in insolvency.

If the assignment by the plaintiff was voidable it was a fraudulent conveyance within the meaning of § 136, and therefore was a sufficient foundation for the insolvency proceedings. *Wyles* v. *Beals*, 1 Gray, 233, 238. Indeed, by St. 1856, c. 284, § 25, which was one of the precursors of Pub. Sts. c. 157, § 96, it is provided expressly that a payment by way of preference shall be a sufficient cause for adverse proceedings. The omission of the words in Gen. Sts. c. 118, §§ 89, 103, 122, was not intended to alter the law. See Commissioners' notes, § 89. We notice that this statute is cited in the margin of Gen. Sts. c. 118, § 122, the section corresponding to Pub. Sts. c. 157, § 136. See further *Ex parte Jordan*, 9 Met. 292; *Fernald* v. *Gay*, 12 Cush. 596, 597; *Lothrop* v. *Highland Foundry Co.* 128 Mass. 120; *Wash-*

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burn v. *Hammond*, 151 Mass. 132, 141. What the effect of St. 1886, c. 322, upon § 93 may be as to matters avoiding a discharge, may be left to be decided when the question arises.

Bill dismissed.

F. H. Williams & F. M. Copeland, for the plaintiffs.

E. G. Loomis, (*C. T. Cottrell* with him,) for the defendant.

CHARLES A. BROWNING & others *vs.* WILLIAM H. CARSON.

Suffolk. December 10, 1894. — March 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Husband and Wife — Married Woman doing Business on separate Account — Promissory Note — Action — Damages — Special Findings of Fact.

The liability of a husband and of his wife, who is doing business on her separate account, for debts incurred by her in carrying on the business, if the certificate required by Pub. Sts. c. 147, § 11, has not been recorded, is several, and not joint.

If the promissory note of a married woman who is doing business on her separate account is taken, by the understanding of both parties, in payment of an existing account for goods sold her by the payee, and no fraud or deceit is practised upon the latter, he cannot, upon discovering that the certificate provided for by Pub. Sts. c. 147, § 11, has been recorded, rescind the transaction by returning the note, and maintain an action against the maker's husband upon the account; and it is immaterial that when the note was given the payee did not know that the certificate had been recorded.

If no demand is made on the maker of a promissory note at its maturity, and no notice of its non-payment is given to the indorser, the latter is not liable to an action thereon.

Although a married woman may not be liable upon a promissory note made by her and her husband, payable to the latter's order and indorsed by him, he is still liable as maker.

If A. and B., her husband, make a promissory note payable to and indorsed by him, and A. also makes another note, both of which are given to C. in payment of an account for goods sold by him to A., who is doing business on her separate account, and the first note is void as to her, but not as to B., and the settlement made by the second note is afterwards repudiated by C., who proves his whole account against the estate of A. in insolvency, the amount received from such estate must be regarded, in an action by C. against B. on the first note and on the account, as received *pro rata* in part payment of the note as well as of the account, and to this extent, if he is not liable on the account, the amount apparently due on the note should be reduced.

If special findings of fact by a judge, trying a case without a jury, appear to have been made upon evidence to which no exceptions were taken, although the ultimate finding of the amount due must be set aside and a new trial had on the question of damages, it is not necessary that the special findings should be set aside also.

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CONTRACT, in three counts. The first count was against the defendant as maker, and the second count was against him as indorser, of a promissory note for $1,836.17, dated June 1, 1891, payable one month after date to his order, signed by M. B. C. Carson, who was the defendant's wife, and also signed and indorsed by the defendant. Payments were also indorsed on the notes amounting to $1,250. The third count was upon an account annexed for goods sold and delivered. Writ dated January 2, 1892.

Trial in the Superior Court, without a jury, before *Braley*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that Mary B. C. Carson, the wife of the defendant, had for some years prior to December 15, 1891, and for a time thereafter, carried on business in Brockton on her sole and separate account; that during this time she from time to time bought of the plaintiffs goods which were used by her in carrying on this business; that goods so bought were charged directly to her on the plaintiffs' books, and were sold on her sole and exclusive credit; that from time to time promissory notes were given by her to the plaintiffs for goods so sold; that on June 1, 1891, she owed the plaintiffs on her notes then overdue and on her account for merchandise the sum of $1,836.17; that on that day the note declared on was given; that on December 15, 1891, she owed the plaintiffs on open account for merchandise the sum of $835.64; that on that day, and never before that time, a certificate in due form that she was a married woman, and as such proposed to carry on business on her sole and separate account, was duly recorded in the city clerk's office in Brockton; and that on December 16, 1891, she gave to the plaintiffs her individual note for said sum of $835.64, and the plaintiffs receipted their itemized account of merchandise to that amount as follows: "Settled by note one month from December 16, 1891. C. A. Browning & Co." It also appeared that at the time of taking the note and receipting the account the plaintiffs did not know that such certificate was so recorded; that they first learned this fact one or two weeks afterwards, and after this action was begun; that on January 5, 1892, the plaintiffs sent Mrs. Carson a written notice that "we repudiate the said note as payment in any sense of your indebtedness to us," and that they had no intention of "releasing any

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security we held therefor, or, by accepting said note, of losing or waiving or releasing any rights against your husband"; that the note was not then tendered to her, and no tender thereof was made to her until, at the time of the trial of this case, the note was tendered her in open court; that she at no time assented to such repudiation or cancellation, or accepted said tender, but refused to accept the same and contended that the note paid the open account; that on January 6, 1892, on her petition, she was adjudged an insolvent debtor, and made a composition offer of twenty-five cents on the dollar to her creditors; that the plaintiffs, in the insolvency proceedings, duly proved their account for merchandise sold to her, being the same account for which the notes of June 1, 1891, and December 16, 1891, had been given, as reduced by the payments made, as appears by the indorsements on the note, and on the account annexed and signed, agreeing to accept the offer in composition, and assenting to her discharge in insolvency upon payment of the amount thereof; that the composition offer was duly paid, and the plaintiffs received the sum of $365.29 as their part thereof, and she was duly discharged in insolvency; and that the defendant was during the whole time living with his wife and knew of these various transactions between her and the plaintiffs, and was present with her when she signed the note dated December 16, 1891, and gave it to the plaintiffs. There was no evidence tending to show that the note dated June 1, 1891, was ever protested for non-payment, or that any notice that it had not been paid was given to the defendant by the plaintiffs.

The defendant presented numerous requests for rulings not material to be stated.

The judge found that at the date of the writ the note declared on amounted to $627.23, and the account amounted to $835.64, making a total of $1,462.87; and that the payment to the plaintiffs of $365.29 left a balance of $1,097.58, which, with interest to the day of the finding, amounted to $1,170.38.

The judge also found the following facts. Mary B. C. Carson, during the year 1891, up to and including December 15, carried on business in Brockton, buying goods of the plaintiffs from time to time, the goods being used by her in carrying on said business. These goods were sold by the plaintiffs directly to her,

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charged to her on their books, and sole and exclusive credit was given to her. During this time the defendant was her husband, lived with her, and knew about her business relation with the plaintiffs. Neither she nor the defendant filed or recorded a certificate that she was a married woman, and as such proposed to do business on her sole and separate account, until December 15, 1891, when such certificate in due form was recorded in the office of the city clerk of Brockton.

On June 1, 1891, she was indebted to the plaintiffs in the sum of $519.05 on merchandise account, and $1,517.14 on notes that were overdue. She paid $200 on the gross amount, leaving a balance due to the plaintiffs of $1,836.17. She and the defendant on that day gave the note declared on to the plaintiffs; and the defendant indorsed the same in blank. The note was complete as to signatures when delivered. On December 15, 1891, she was indebted to the plaintiffs in the sum of $835.64 on merchandise account, being goods sold to her on her own credit. On December 16, 1891, the plaintiffs received from her a promissory note dated that day for the same amount; this note was signed by her alone. An itemized account for that amount was receipted at the same time and given by the plaintiffs to the defendant. The form of the receipt was: "Settled by note one month from December 16, 1891. C. A. Browning & Co." At the time of taking the last note and receipting the account, the plaintiffs did not know that a certificate had been filed by her on December 15, 1891.

On January 5, 1892, having found that such certificate had been filed, and after consulting counsel, the plaintiffs notified her that "we repudiate the said note as payment in any sense of your indebtedness to us." This notice was in writing, and stated, in substance, that the plaintiffs, at the time of taking the note, did not know of the filing of the certificate, and that there was "no intention of releasing any security we held therefor, or by accepting said note of losing or waiving or releasing any rights against your husband." The note, at the trial of this case, was tendered to her in open court. She at no time accepted such cancellation or repudiation, and contended that the open account was paid by the note.

On January 6, 1892, on her petition, she was adjudicated an

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insolvent debtor, and thereafter made a composition with her creditors of twenty-five cents on the dollar. The plaintiffs did not prove either note against her estate, but received the sum of $365.29 on their claim; and she was duly discharged therefrom. This sum of $365.29 is all that the plaintiffs have received from her or from any source on account of her indebtedness to them since December 16, 1891.

It had been the practice of the parties during their business relations from time to time, on the one side to give notes for accrued indebtedness and on the other to take the notes, receipt the open account, and thereafter rely upon the note or notes. The transaction of December 16 did not differ from previous transactions between the parties, and the giving of the note and the receipting of the open account was payment by note of that account, and was at the time so understood and acted on by the plaintiffs and Mrs. Carson. The defendant was present at the time, and no fraud or deceit was practised by the defendant or his wife on the plaintiffs at the time to induce the plaintiffs to take the note and receipt the account. When the note declared on became due it was not protested, and no notice of the failure of Mrs. Carson to pay the same was given to the defendant.

The judge refused to rule as requested, and ruled that, under the first count of the declaration, the defendant was liable on the note as maker, and as between him and the plaintiffs it was a valid contract; and that, under Pub. Sts. c. 147, § 11, the liability of the defendant and his wife to the plaintiffs was several, and not joint, and the giving of the note by her to the plaintiffs, the same not having been paid, did not relieve the defendant from his statutory liability to pay the open account declared on in the third count of the declaration; and found and ordered judgment for the plaintiffs on the note and account in the sum of $1,170.38.

The defendant alleged exceptions.

W. H. Carson, pro se, did not care to be heard.

C. T. Davis, for the plaintiffs.

FIELD, C. J. But for Pub. Sts. c. 147, § 11, Mrs. Carson alone would have been liable to pay for the goods sold to her, as they were sold on her sole credit. See § 10. By the eleventh section the husband is made liable if the certificate required by

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that section is not recorded "in the same manner and to the same extent as if such contracts had been made by himself." The wife is liable because she bought the goods on her separate account. The husband is liable because the statute makes him liable if a certificate is not recorded. *Feran* v. *Rudolphsen*, 106 Mass. 471. The liability is not joint, but several. *Ridley* v. *Knox*, 138 Mass. 83. The court trying the case without a jury has found that the note of Mrs. Carson given on December 16, 1891, was taken in payment of the account then existing, and was so understood by the plaintiffs and Mrs. Carson, and that no fraud or deceit was practised on the plaintiffs. The account having been paid by the note, neither the wife nor the husband is liable on the account, and the husband is not liable on the note because he is not a party to it. On the facts found, the plaintiffs could not rescind the transaction by returning the note. It is immaterial that when the note was given the plaintiffs did not know that the certificate had been recorded. It does not appear that the plaintiffs at that time knew anything about the statute on the subject. The statute requires the recording of a certificate to protect the husband from liability; if a certificate is not recorded, he is liable; if it is recorded, he is not liable on contracts made after the certificate has been recorded. The belief or knowledge on the part of the plaintiff that a certificate has or has not been recorded, or their knowledge of the statute, is in either case immaterial. The court should have ruled on the third count that, as the note given by the wife was taken by the plaintiffs in payment of the account, the plaintiffs could not recover against the defendant on that count.

The first and second counts are upon the note given on June 1, 1891, signed by both the husband and wife, and payable to the order of the husband and by him indorsed in blank to the plaintiffs. The facts found by the court, that no demand was made on the makers at the maturity of the note and no notice of non-payment given to the defendant as indorser, prevent the plaintiffs from recovering against the defendant on the second count, which is against him as indorser of the note.

The first count is against the defendant as maker of the note given June 1, 1891. Whether this note was given as absolute payment of the account and of the notes then unpaid, or as con-

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ditional payment or as collateral security for the payment of this indebtedness, there was a valuable consideration for the note. We assume that the note was not valid against the wife, because it was payable to her husband's order, and was by him indorsed to the plaintiffs. *Roby* v. *Phelon*, 118 Mass. 541. Her contract as maker of the note being void, the husband is still liable as maker. When two persons execute a contract and one is not bound by reason of some disability, the other remains bound, especially when the facts which constitute the disability are known to the other. *Woodward* v. *Newhall*, 1 Pick. 500. *Tuttle* v. *Cooper*, 10 Pick. 281, 291. *Yale* v. *Wheelock*, 109 Mass. 502.

The court found that at the date of the writ there remained unpaid on the note declared on $627.23, and on the account declared on $835.64, making a total of $1,462.87; that deducting the amount received by the plaintiffs from Mrs. Carson's estate in insolvency, viz. $365.29, there was left a balance of $1,097.58, which with interest up to the day of the finding amounted to $1,170.38; and that this amount was due to the plaintiffs from the defendant. We understand that the plaintiffs proved against Mrs. Carson's estate in insolvency their whole account for which both notes were given. Whether a proof in this form ought to have been allowed is a question not before us. The amount received from her estate in insolvency must be regarded as received *pro rata* in part payment of the debt for which the note declared on was given as well as of the account declared on. To this extent the amount apparently due on the note should be reduced, and there should be a finding for the remainder, with interest from the date of the writ. On this bill of exceptions the only order we can make is that the exceptions be sustained; but this does not render it necessary that the special findings of fact by the court should be set aside, although the ultimate finding of the amount due must be. The special findings of fact appear to have been made upon evidence to which no exceptions have been taken; and when the amount due on the note declared on in the first count is found, and the proper deduction made on account of the amount received from Mrs. Carson's estate in insolvency, the whole amount of the damages recoverable by the plaintiffs will appear. There must be a new trial on the first count on the question of damages.

Exceptions sustained.

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CRAIG SILVER COMPANY *vs.* IRA P. SMITH & another.

Suffolk. December 13, 14, 1894. — March 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Corporation — Party — Contract — Certificate of Stock — Defence — Pleading — Release of Claim by Treasurer of Corporation — Power of Attorney — Discharge of Cause of Action.

If a corporation organized in West Virginia, but having its usual place of business in Connecticut, enters into a contract for the sale of certain of its shares, and also of goods manufactured by it, and delivers a part of the shares and also certain goods in pursuance thereof, and afterwards another corporation with the same name is organized by the same persons in Connecticut, but without any consolidation of the two corporations, an action for the price of the shares and of the goods sold can only be maintained by the West Virginia corporation; and an action brought in this Commonwealth in the name common to both corporations, and not stating which of them is the plaintiff, but alleging that the plaintiff made the contract, will be assumed to have been brought by the West Virginia corporation, although it is described as having its usual place of business in Connecticut. And in such action a tender of a certificate of shares, in which the name of the corporation is that common to both corporations, and which does not in terms state the domicil of the corporation, but which is dated in Connecticut, and is signed by an officer of the Connecticut corporation who was not an officer of the West Virginia corporation, will be deemed to be a tender of shares in the Connecticut corporation, and not a tender of such shares as the contract calls for.

One who has been summoned as trustee in another jurisdiction is not liable to be held in an action subsequently brought against him by his creditor here; but this defence is not available, whether pleaded in bar or abatement, if his liability elsewhere has wholly ceased without payment by himself.

An answer or plea in abatement cannot be filed after an answer on the merits; the latter waives all matters in abatement.

The treasurer of a corporation has no authority, merely by virtue of his office, to release a claim of the corporation.

A power of attorney executed by a corporation, and authorizing its treasurer to sell the right to use a secret process in Europe, with full power to do everything requisite and necessary in the premises, does not confer authority to pay a sub-agent whom he employs by releasing a large claim which the corporation holds against such sub-agent.

CONTRACT, in two counts. The first count alleged that, on February 9, 1893, the plaintiff made a contract with the defendants, a copy of which was annexed, whereby the plaintiff agreed to sell and the defendants agreed to buy two hundred and fifty shares of the capital stock of the plaintiff upon certain terms,

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with which the defendants had failed and neglected to comply. The second count was upon an account annexed for goods sold and delivered. The copy of the contract annexed to the declaration described the party of the first part as "the Craig Silver Company, a corporation duly and legally organized under the laws of the State of West Virginia," and having its principal place of business in Bridgeport in the State of Connecticut. The writ was dated September 13, 1893, and described the plaintiff as "a corporation duly established according to law, and having its usual place of business in Bridgeport in the State of Connecticut."

Trial in this court, without a jury, before *Holmes*, J., who reported the case for the consideration of the full court; such judgment to be entered as the court might direct. If judgment was entered for the plaintiff, it was to be for $14,395.43 on the first count, and for $4,176.26 on the second count. The questions reserved, and also the facts, appear in the opinion.

T. M. Maltbie (of Connecticut) & *J. W. Keith*, for the plaintiff.

A. Hemenway, for the defendants.

ALLEN, J. 1. We will first consider the question, "Is the plaintiff the proper party to maintain the action?"

The charter of the West Virginia corporation bore date July 16, 1892; that in Connecticut, May 3, 1893. The latter by its terms was not to take effect till accepted by the stockholders. This acceptance was on May 15, 1893. Till this last date there was no corporation except that organized in West Virginia. The contract with the defendants was dated February 9, 1893, and on its face was the contract of the West Virginia corporation, and the defendants' promise was to that corporation. No goods were delivered to the defendants after May 15, 1893, and the liability of the defendants to pay for them was a liability to the West Virginia corporation. There can be no doubt, therefore, that the proper party to bring an action is the West Virginia corporation. It is a little curious that a doubt should now for the first time arise as to which of the two corporations is actually the plaintiff. This is not stated in terms in the writ or declaration; but it is alleged that the plaintiff made the contract, and this implies that the corporation which made the contract is the party suing upon it. We therefore treat the

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plaintiff as being the West Virginia corporation, which is the proper party to maintain the action if it can be maintained.

2. "Was the certificate of stock tendered to the defendants a compliance with the terms of said contract?"

By the contract, the plaintiff sold to the defendants two hundred and fifty shares of its capital stock for $25,000, to be paid in instalments, — viz., $10,000 in cash, $10,000 in ninety days, and $5,000 in six months, — less a commission of ten per cent allowed in a previous proposal by the plaintiff to the defendants. The first payment was made, and a certificate for one hundred shares was delivered. On or about August 9, 1893, a certificate for one hundred and fifty shares of the Craig Silver Company was tendered, not stating in terms whether it was the company organized in West Virginia or that organized in Connecticut. The contract says nothing in express terms about the delivery of certificates of the shares, but, in the absence of anything to show the contrary, it must be implied that such delivery was to be made concurrently with the payments. The plaintiff now contends that no tender of certificates was necessary, and cites decisions to show that a subscriber to the shares of a corporation becomes a stockholder upon making payment for the shares, and before the delivery to him of the certificate. But that rule is not applicable to the contract in this case, nor was it so understood by the parties; and the report, as we understand it, was not intended to present that question. The question presented is whether the shares represented by the certificate were such as the contract called for. And this leads us to inquire what the shares really were, and what was the relation of the two corporations to each other.

The two corporations were never consolidated or amalgamated so as to become a single corporate body. The charter in West Virginia contains no provision looking to a subsequent incorporation elsewhere, or to a sale of its franchise; nor is there anything to show any authority or sanction under the laws of that State for any such change in the character of the corporation there organized. The charter granted in Connecticut provides for succession to the functions of the West Virginia corporation, but not for amalgamation with it. There is no provision that the two shall become one; nor could such provision in Con-

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necticut alone avail to accomplish that purpose. We have not therefore to deal with a case where shares in a consolidated corporation were tendered in performance of a contract to deliver shares in one of the original corporations, nor to consider the subsequent legal status of two corporations which have united under adequate legislative authority. Here, the two corporations remained distinct corporate bodies, there having been no legislation in either State looking to an amalgamation.

The certificate tendered seems to be studiously silent as to the domicil of the Craig Silver Company, whose shares it represents. But it is signed by "H. R. Parrott, President," and Parrott had been elected president of the Connecticut corporation, but not of the West Virginia corporation. Moreover, the certificate was issued and dated in Connecticut, it bearing upon its face the words, "Bridgeport, Conn., Aug. 9, 1893." There is nothing to show that the West Virginia corporation could hold meetings for the choice of officers outside of that State. Its charter requires it to "have a local office, as prescribed by law, at Parkersburg in the State of West Virginia." We cannot assume that meetings of stockholders could be held in Connecticut, in the absence of anything to show the existence of such power. Cook, Stock & Stockholders, (3d ed.) § 589, and cases there cited. Moreover, after the Connecticut charter was granted, a meeting was held and the charter accepted, and thereupon directors were chosen, and afterwards Parrott was chosen President, he never having been chosen president of the West Virginia corporation. The directors of the Connecticut corporation held a meeting on July 10, 1893, and it was voted "that the president and secretary be and hereby are authorized and directed to take proceedings to collect all claims due this company from Smith and Winchester [the defendants] or either of them." In pursuance of this vote the certificate above mentioned was tendered to the defendants. Taking all these things together, it is obvious that the certificate tendered was a certificate of shares in the Connecticut corporation. It may be assumed that this corporation had succeeded to the property and rights of the West Virginia corporation, but it was not identical with that corporation. Not to mention other reasons why the defendants are not bound to look upon the shares as identical with those

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which under their contract they were to receive, the measure of personal liability for corporate debts may be different in the two States. We do not know how this is, and need not inquire. It is enough to say that the defendants contracted to buy shares in the West Virginia corporation, and were not bound to accept shares in the Connecticut corporation. They protested and voted against the acceptance of the Connecticut charter, and never in any way ratified its adoption. Their relations were simply with the West Virginia corporation, and there was nothing in its charter, or, so far as made known to us, in the laws of that State, or in their own conduct, which bound them in any manner to enter into or to recognize the Connecticut corporation. Under these circumstances, it is clear that they could not be compelled against their will to take the shares in the Connecticut corporation. See *Clearwater* v. *Meredith*, 1 Wall. 25, 39–41; *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 136 U. S. 356, 372–382; *Hamilton Ins. Co.* v. *Hobart*, 2 Gray, 543; *John Hancock Ins. Co.* v. *Worcester, Nashua, & Rochester Railroad*, 149 Mass. 214; *Day* v. *Worcester, Nashua, & Rochester Railroad*, 151 Mass. 302; *Richmond Factory Association* v. *Clarke*, 61 Maine, 351; Cook, Stock & Stockholders, (3d ed.) §§ 500, note, 502, 896, and cases there cited; Beach, Corp. §§ 351–353, and cases there cited. For these reasons, this question which was reserved is answered in the negative.

3. "Are the said trustee suits a bar to the action?"

Independently of our statutes, the general rule of law, subject to some exceptions, is that the pendency of another action for the same cause can only be pleaded in abatement; and that the pendency of such other action in another State is not a good plea in abatement. 1 Chit. Pl. (14th Am. ed.) 469, 470. *Morton* v. *Sweetser*, 12 Allen, 134, 137. *Moore* v. *Spiegel*, 143 Mass. 413. A partial exception to the latter rule has been established in this Commonwealth, and also elsewhere, for the protection of persons who have been summoned as trustees in other States. One who has been summoned as trustee in another jurisdiction is not liable to be held in an action subsequently brought against him by his creditor here. *American Bank* v. *Rollins*, 99 Mass. 313. *Whipple* v. *Robbins*, 97 Mass. 107. *Embree* v. *Hanna*, 5 Johns. 101. *Wallace* v. *M'Connell*, 13 Pet. 136, 151. But

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the defence on this ground, even when seasonably pleaded, is not an absolute one. It is only available so long as the peril elsewhere continues. The object is to protect defendants here from double liability. If liability elsewhere has ceased, a defence on that ground will not avail here. This was held in *Meriam* v. *Rundlett*, 13 Pick. 511, and recognized by implication in *Garity* v. *Gigie*, 130 Mass. 184, and *Eddy* v. *O'Hara*, 132 Mass. 56, in which cases it was held that, if one who is sued here makes payment or is compellable to pay elsewhere under proceedings instituted against him by way of garnishment or trustee process, it will be available here by way of defence. In *American Bank* v. *Rollins*, 99 Mass. 313, it was unnecessary to advert to this reasonable qualification of the rule there announced by way of illustration and explanation of the point there decided. In whatever way this defence is set up, it is only good when the defendant has been held or may be held elsewhere. If his liability elsewhere has wholly ceased without payment by himself, he cannot forever escape from paying his debt here merely because he was for a time liable to be held to pay it elsewhere. 13 Pick. 515, 516. It is found by the court in the present case that in the first trustee suit in Connecticut judgment was rendered for the plaintiff and execution issued, which was returned unsatisfied, January 15, 1894, and that by the statutes of Connecticut "the lien of said judgment and execution upon the funds due from the defendants herein to the plaintiff had been terminated." This termination of the lien in Connecticut was before the defendants had set up this ground of defence in their amended answer. As to the second trustee suit in Connecticut, the defendants set up in their answer that it was then still pending; but the court found that the attachment was dissolved by filing a bond to dissolve it, in compliance with the statutes of Connecticut. The date of the dissolution of the attachment is not given, and it is not material. It appears that at the time of the trial the defendants were no longer under any peril from the trustee suits in Connecticut, and therefore no defence was then available for them, by reason of those suits, whether in bar or abatement.

It is further to be observed that the defendants in this case filed a general answer on the merits, without any plea in abate-

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ment or suggestion in any form of the trustee suits in Connecticut, on the 1st of November, 1893; and not till May 10, 1894, were these suits set up in defence in an amended answer, by reason of which, according to the language of the amended answer, "the defendants say that this action was begun before the right of action accrued to the plaintiff." By Pub. Sts. c. 167, § 13, defences in abatement may be made by answer; and by the 5th rule of this court answers and pleas in abatement must be filed within the time allowed by law for entering an appearance, unless otherwise specially ordered by the court for good cause shown. By general rule of law an answer or plea in abatement cannot be filed after an answer on the merits; the latter waives all matters in abatement. The original answer, if seasonably filed, may contain matters in abatement and matters on the merits; but after an answer on the merits it is too late for an answer in abatement. *Hastings* v. *Bolton*, 1 Allen, 529. *Jaha* v. *Belleg*, 105 Mass. 208, 211. *O'Loughlin* v. *Bird*, 128 Mass. 600, 602. It was for this reason, we presume, that the learned counsel for the defendants sought to make the defence on the ground of the trustee suits serve as matter in bar, and did not call it matter in abatement. Whether this defence was available at the time when it was first set up, in the amended answer, is certainly open to doubt; but as the point has not been argued, we do not place the decision on that ground.

4. "Is said release a discharge of the cause of action?"

Soule was treasurer of both corporations, but it is quite clear that he had no authority to release the plaintiff's claim merely by virtue of his office as treasurer.* We have had occasion more than once heretofore to consider the implied powers of treasurers of corporations; see *Merchants' National Bank* v. *Citizens' Gas Light Co.* 159 Mass. 505, and cases there cited;

* The release in question recited that, for a valuable consideration, "we do agree to immediately withdraw any and all suits or actions at law" against the defendants, "hereby acknowledging our full satisfaction, and further agree to bind ourselves" not to bring any other suits against the defendants in connection with the business of the Craig Silver Company; and was signed "D. E. Soule, Attorney in fact," and "Craig Silver Co., D. E. Soule, Treas.," and sealed.

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but no case holds or implies, and indeed the defendants do not contend in argument, that Soule had such authority simply as treasurer. But it is contended that this power is incident to his authority under the power of attorney which he held. This instrument was executed by the Connecticut corporation, which we may assume to have been the beneficial owner of the claim against the defendants, and it appointed Soule attorney to sell the right to use the secret process for making Craig silver in Great Britain and Ireland and the British Provinces, except Canada, and the several countries of Europe, and to convey the same upon such terms and conditions and with such restrictions as might be agreed upon by the parties, and to receive and receipt for the money; with "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises fully, with full power of substitution and revocation."

Formal powers of attorney are construed with some strictness; Story, Agency, §§ 68, 69; but it may be stated, in general, that Soule might probably use all necessary and reasonable means of executing his agency with effect, including the employment of necessary assistance on reasonable terms. We see nothing to enable us to say that the employment of the defendant Smith was in itself unreasonable, and it does not seem to have been so treated at the trial. But Soule could only employ Smith on such reasonable terms as must be deemed to have been within the contemplation of the plaintiff at the time of the execution of the power of attorney. There is certainly no presumption in favor of Soule's authority to make such an unusual bargain as was made in respect to Smith's compensation. We would not go so far as to say that a sub-agent could never under any circumstances be paid by releasing a claim in favor of the principal against him. The claim might be small, and his services so valuable as clearly to exceed the full amount thereof. We limit ourselves to the facts of the present case. The claim against the defendants was already in suit, and it was for a very considerable sum. The plaintiff's president and secretary were by special vote intrusted with the enforcement of it. The litigation was pending in Massachusetts. Soule and Smith were in London. There is nothing to show the amount or value of the

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services which Smith was to render. They might be either great or small. So far as can be judged from the facts reported to us, it would seem that the act of Soule in releasing the defendants from the plaintiff's claim against them was outside of the authority conferred upon him. This method of paying him is certainly unusual, and, in order to be binding on the plaintiff, there should at least be proof that it was an advantageous arrangement. See *Shaw* v. *Stone*, 1 Cush. 228, 245; *Upton* v. *Suffolk County Mills*, 11 Cush. 586. The presiding justice ruled that it was not reasonable to get Smith's services in this way, and that the release was therefore not a defence to this action. This ruling will stand unless we can see that it was wrong. But, so far as we can see, it was right. If, under the agreement with Soule, Smith or the defendants rendered services for which the plaintiff would be responsible, the particular mode of payment provided for is not binding on the plaintiff, and compensation must be sought in some other way. No other mode of compensation is sought for in defence of this action.

According to the terms of the report, the result is that judgment is to be entered for the defendants on the first count of the declaration, and for the plaintiff in the sum of $4,176.26 on the second count. *So ordered.*

ELIZABETH AUSTIN *vs.* FRANK E. BAILEY.

Middlesex. December 14, 1894. — March 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Will — Petition by Devisee for Instructions — Statute — Writ of Entry.

On a petition to this court by A., asking for the construction of a provision of a will to the effect that certain real estate on the decease of the life tenant, who was the testatrix's husband, should go to "my said sister A., and in case of her death before the death of my said husband, then to her heirs at law, and to my niece B. and my nephew C., to have and to hold the same to them equally and as tenants in common," the court said that the petition would not lie, as this was not a case in which the petitioner had any duties to perform under the will, or needed the instruction of the court as to any duties arising in the administration of the testatrix's estate, but that as the case had been fully argued, and as all

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parties desired an opinion, it would say that it was of opinion that A. took only one undivided third part of the real estate, and that B. and C. each took an undivided third part.

PETITION, by a legatee under the will of Jane Manning, for the construction thereof. Hearing before *Field*, C. J., who reserved the case, on the petition, answer, and agreed facts, for the consideration of the full court.

J. S. Patton, for the petitioner.

L. R. Wentworth, for the respondent.

FIELD, C. J. This is a petition for the construction of the will of Jane Manning. The petitioner claims, under the fourth article of the will, title in fee simple to the whole of certain real estate in Somerville, Timothy Manning, the husband of the testatrix, having died on August 7, 1893.* The respondent claims title to two undivided third parts of said real estate under the same article of the will, having purchased the interest of Timothy Horrigan and of Annie M. Horrigan in said estate. The respondent is in possession of the property. It is plain that this is not a case in which the petitioner has any duties to perform under the will, or where she needs the instruction of the court as to any duties arising in the administration of the estate of Jane Manning. So far as appears, the dispute does not in any way concern the administration of that estate. See *Healy* v. *Reed*, 153 Mass. 197. The whole question in the case relates to the extent of the title of the parties to the real estate of which

* At the time of her death the testatrix was the owner in fee simple of two houses, with the land thereto belonging, situated on Somerville Avenue in Somerville, one numbered 90 and 92 and one 94 in the numbering of that avenue.

By her said will she devised to her husband, Timothy Manning, for life, both of the houses and land, excepting one tenement in the house No. 94 Somerville Avenue, with the privileges and appurtenances thereto belonging, then occupied by Mary E. C. Smyth.

The fourth section of the will provided as follows: "On the decease of my said husband I give, bequeath, and devise the said house and land numbered 90 and 92 Somerville Avenue, and the portion of said house and land numbered 94 Somerville Avenue, which I have given to him, to my said sister Elizabeth Austin, and in case of her death before the death of my said husband, then to her heirs at law, and to my niece Annie M. Horrigan and my nephew Timothy Horrigan, to have and to hold the same to them equally and as tenants in common to them and to their heirs and assigns forever."

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the respondent is in possession. Both parties derive their titles under the will of Jane Manning, but this does not entitle either to ask this court by petition for instructions upon the proper construction of the will. This would be manifest if this petition were regarded as a bill in equity asking for instructions; but it is said that it may be regarded as a petition under Pub. Sts. c. 127, § 34. See St. 1891, c. 415, § 3.

We are of opinion that this section of the Public Statutes must be confined to matters and questions necessary to be determined in the administration of estates under wills. Under this petition we cannot give to the petitioner any effective remedy to recover possession of the real estate, or of any part of it to which we may think she is entitled. The position of the parties is much the same as if they claimed title under a deed the construction of which is in doubt. The true remedy of the petitioner is by writ of entry, in the trial of which it would be necessary to determine the meaning of this article of the will.

But as the parties have fully argued the somewhat difficult question of construction to be given to the clause of the will under which they both claim title, and as they are all the parties interested in the question, and both desire our opinion on it, we have considered it, and under the circumstances think it best to say that in our opinion the petitioner took only one undivided third part of the real estate under the fourth article of the will, and that Annie M. Horrigan and Timothy Horrigan each took an undivided third part. The petition must be dismissed, as not stating a case in which the petitioner can ask the court for instructions upon the construction to be given to a will.

Petition dismissed.

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WILLIAM TWOMEY *vs.* G. F. SWIFT & another.

Middlesex. January 16, 17, 1895. — March 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Defective Staging — Negligence — Due Care — Evidence.

In an action for personal injuries occasioned to the plaintiff, a carpenter, while in the defendant's employ, by the fall of a staging on which he was standing when at work upon a building, it appeared that the fall of the staging was caused by the breaking of a piece of board called a ledger-board, on which as a cross-piece the plank rested upon which the plaintiff stood; that this ledger-board, which was a piece of hemlock somewhat cross-grained, was about four or five feet long, six inches wide, and seven eighths of an inch thick, and was fastened at one end to a cleat nailed to the side of the building, and at the other end to an upright post; and that the accident happened on a cold day in winter. There was evidence that hemlock boards of the thickness of seven eighths of an inch, but of different widths, were the only materials furnished by the defendant which could properly be used for the support of the planks which formed the floor of the staging; that hemlock boards of that thickness are not suitable material for the construction of stagings; that hemlock boards are usually of coarse grain; that in cold wet weather they readily fill with moisture and freeze, and become very brittle; that when filled with frost it is difficult to detect the grain; that they are not as strong as many other kinds of lumber, and are not commonly used for staging, particularly in cold weather; that a carpenter of ordinary skill might not know the great danger of using hemlock boards as supports in the construction of stagings; and that the plaintiff had nothing to do with the construction of this staging. *Held*, that there was evidence that the defendant had not used due care in furnishing suitable materials for the staging; and that the question whether the plaintiff used due care in going upon it was for the jury.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of a staging on which he was standing when at work upon a building, it appeared that the fall of the staging was caused by the breaking of a piece of hemlock board somewhat cross-grained, called a ledger-board, on which as a cross-piece the plank rested upon which the plaintiff stood, and which was fastened at one end to a cleat nailed to the side of the building and at the other end to an upright post. The following question was put to a witness, and excluded: "Assuming that the staging is built of a piece of cross-grained hemlock, six inches wide, or thereabouts, is used for a ledger-board, as has been stated here, and it breaks down, what could you say was the cause of that breaking down?" *Held*, that the question was properly excluded.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of a staging on which he was standing when at work. Trial in the Superior Court,

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before *Mason*, C. J., who declined to rule, as requested by the defendants, that the plaintiff could not recover.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

F. Hutchinson, for the defendants.

G. L. Mayberry, for the plaintiff.

FIELD, C. J. This is an action at common law. The plaintiff, a carpenter, was injured by the fall of a staging on which he was standing when at work for the defendants. The defendants were erecting an ice-house, but were not personally directing the work. They employed a suitable superintendent, who had under him a large number of workmen. The cause of the fall of the staging was that a piece of board called a ledger-board broke, on which as a cross-piece the plank rested on which the plaintiff stood. This ledger-board was about four or five feet long, six inches wide, and seven eighths of an inch thick, and was fastened at one end to a cleat nailed to the side of the building and at the other end to an upright post. It was a piece of hemlock board somewhat cross-grained. There was evidence that hemlock boards of the thickness of seven eighths of an inch, but of different widths, were the only materials furnished by the defendants which could properly be used for the support of the planks which formed the floor of the staging. The accident happened on the seventh day of February, which was a cold, blustering day. There was evidence that hemlock boards of the thickness of seven eighths of an inch are not suitable material for the construction of stagings; that hemlock boards are usually of coarse grain; that in cold wet weather they readily fill with moisture and freeze, and become very brittle; that when filled with frost it is difficult to detect the grain; that they are not as strong as spruce or pine, or many other kinds of lumber, and are not commonly used for staging, particularly in cold weather. It probably is true that hemlock lumber may be selected large enough, and of such quality, as to make a reasonably safe staging in any season of the year, but there was evidence not objected to that a carpenter of ordinary skill might not know the great danger of using hemlock boards as supports in the construction of stagings.

The defendants rely upon *Kelley* v. *Norcross*, 121 Mass. 508;

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Killea v. *Faxon*, 125 Mass. 485; *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209; *Hoppin* v. *Worcester*, 140 Mass. 222; *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13; *Kennedy* v. *Spring*, 160 Mass. 203; and other similar cases. But in all these cases it appears either that the defendants did not furnish the materials or appliances used, or that they furnished suitable materials, and that it was the carelessness of a fellow servant of the plaintiff in selecting the particular appliance or material which occasioned the injury. In the case at bar, while there was evidence that the carpenters who constructed the staging were careless in selecting and using this particular piece of board for the ledger-board, and perhaps evidence that the superintendent employed by the defendants was also careless, we think that there was also some evidence for the jury that the hemlock boards furnished by the defendants were generally unsuitable for the purpose of constructing stagings; that this was one purpose for which they were intended by the defendants to be used, and that therefore there was some evidence that the defendants had not used due care in furnishing suitable materials. See *Arkerson* v. *Dennison*, 117 Mass. 407; *Rice* v. *King Philip Mills*, 144 Mass. 229. There was evidence that the plaintiff had nothing to do with the construction of the staging, and the question whether he was in the exercise of due care in going upon it was for the jury. The hypothetical question * put to one Winans by the defendants, which was ruled out against their objection, related to the cause of the breaking down of the staging, and was, we think, intended to ask for an opinion as to whose negligence caused the accident. It was properly excluded.

Exceptions overruled.

* This question was as follows: "Assuming that the staging is built of a piece of cross-grained hemlock, six inches wide, or thereabouts, is used for a ledger-board, as has been stated here, and it breaks down, what could you say was the cause of that breaking down?"

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STEPHEN A. BROWNELL & others *vs.* RAILROAD COMMISSIONERS.

Suffolk. January 18, 1895. — March 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Statute requiring Railroad Corporation to operate Ferry — Order of Railroad Commissioners — Certiorari.

A statute required a railroad corporation to operate a ferry between a city and a town named, and provided that the corporation should "forfeit to the Commonwealth one hundred dollars a day for each day's delay in operating such ferry" after a day named, "or after the expiration of such further time as the railroad commissioners may upon hearing prescribe," and that this court should have jurisdiction in equity, upon a petition of ten or more citizens of the city or town named, to enforce the provisions of the statute. The railroad corporation failed to comply with the statute, and a petition in equity was filed as therein provided. Two months after the time limited in the statute, the corporation requested the railroad commissioners, after a hearing, to "prescribe such further time for delay in operating" the ferry as might appear to the commissioners to be reasonable. The commissioners thereupon, after a hearing, passed an order, naming a day six months later than that named in the statute "as the day after which, instead of after the" other day, the corporation should "forfeit to the Commonwealth one hundred dollars a day for each day's delay in operating" the ferry, "with leave to the petitioner to apply for further postponement of time." *Held*, upon a petition by ten citizens of the city and town named for a writ of certiorari to quash the order, that the statute was intended to give the railroad commissioners power to grant further time to the corporation on a petition filed after the day named in the statute; that the order of the commissioners was to be construed, not as relating solely to forfeitures, but as granting delay in operating the ferry for all purposes up to the extended day named, and, so construed, it was within the authority intended to be given to the commissioners; and that the petition for certiorari must be dismissed without prejudice to the other proceedings.

PETITION, filed November 2, 1894, by ten citizens of New Bedford and three citizens of Fairhaven, for a writ of certiorari to the board of railroad commissioners.

The petition alleged that on May 15, 1894, chapter 392 of the Acts of that year * went into effect, requiring the Old Colony

* This statute, which was passed on May 15, 1894, and entitled "An Act requiring the Old Colony Railroad Company to operate a ferry across the Acushnet River between the city of New Bedford and the town of Fairhaven," is as follows:

"Section 1. The Old Colony Railroad Company is hereby required to pro-

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Railroad Company, a corporation, to provide and operate a ferry across the Acushnet River between New Bedford and Fairhaven on and after August 1, 1894, and with a forfeiture of one hundred dollars a day for each day's non-performance after August 1; that that period elapsed without any effort or intent of the railroad corporation to obey the statute; that on August 18 the petitioners filed a bill in equity in this court, in the county of Bristol, for the enforcement of the statute and the forfeitures prescribed therein; that due service was made in the equity suit upon the railroad company, which, on September 24, 1894, filed its answer therein, not alleging any intent or effort to obey the statute, but denying its validity; that on October 1, 1894, the Attorney General answered in said suit, confirming the correctness of the petitioners' allegations therein, and in behalf of the Commonwealth claimed against the railroad company the forfeitures accrued and accruing under the provisions of the statute; that on October 1, 1894, the railroad company had been in default, and had disobeyed the statute for the period of sixty-one days, and had incurred the penalty of $6,100 therefor, and on that day the corporation filed a petition to the board of railroad commissioners, requesting that "after hearing you will prescribe such further time for delay in operating a ferry between New Bedford and Fairhaven, under chapter 392 of the

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vide and operate a suitable ferry between some point in the city of New Bedford at or near the easterly termination of School Street and some point in Fairhaven at or near the southerly termination of Water Street, in accordance with the provisions of chapter one hundred and eight of the Acts of the year eighteen hundred and thirty-two and chapter one hundred and twenty-four of the Acts of the year eighteen hundred and fifty-four.

"Section 2. Said company shall forfeit to the Commonwealth one hundred dollars a day for each day's delay in operating such ferry after the first day of August in the year eighteen hundred and ninety-four, or after the expiration of such further time as the railroad commissioners may upon hearing prescribe, and the Supreme Judicial Court shall have jurisdiction in equity upon a petition of ten or more citizens of the city of New Bedford, or of the town of Fairhaven, to enforce the provisions of this act.

"Section 3. Said company is hereby authorized to collect and receive such toll for the transportation of persons, animals, vehicles, articles or freight as shall be approved by the board of railroad commissioners, but such toll shall not exceed the sum of five cents for transportation one way across said river for any one person.

"Section 4. This act shall take effect upon its passage."

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acts of the year 1894, as may appear to you to be reasonable"; that that petition came on to be heard before the railroad commissioners on October 15, 1894, and no evidence was offered in support of it, and no assertion of any diligence or effort to obey the statute was made, and the only ground upon which it was pressed was that the railroad company might be enabled to litigate the validity of the statute; and that the present petitioners opposed the request, but on October 29, 1894, the railroad commissioners passed the following order:

"Ordered, that, under and pursuant to the provisions of section 2 of the act aforesaid, the first day of February, 1895, be prescribed as the day after which, instead of after the first day of August, 1894, the said Old Colony Railroad Co. shall forfeit to the Commonwealth one hundred dollars a day for each day's delay in operating a ferry across the Acushnet River between the city of New Bedford and the town of Fairhaven, as provided in said act; with leave to the petitioner to apply for further postponement of time, and with leave to any ten or more citizens of said city or town to apply for a vacation of this order, for respective cause shown, and after notice and hearing on such application."

The petition further alleged that the above order was invalid; that the existence of the order obscured and confused the remedies of the statute in respect of the corporation's disobedience and default, prejudiced the methods of relief vested in these petitioners in their pending equity suit, and clouded the right of the Commonwealth; and that the order ought not to stand, for various reasons assigned.

The prayer of the petition was that a writ of certiorari might issue, commanding the board of railroad commissioners to return to this court a full, true, and perfect record of their proceedings in the premises; and that the same might be quashed.

The return and answer of the respondents, after reciting the petition of the railroad company and the order of notice issued thereon, and that there was a hearing, after public notice, on October 15, 1894, counsel appearing for the petitioner and for the city of New Bedford and other remonstrants, contained the following statements:

"The statute is mandatory in its terms, and bears the evi-

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dence on its face, if the fact did not otherwise appear, that its framers had reason to believe that the railroad company did not, and without an appeal to the courts probably would not, concede the power of the Legislature to impose upon it the duty or service in question. . . .

"Two remedies were thus provided, a forfeiture of $100 for each day's delay in operating the ferry after a day named, with a discretionary power in the board to postpone the time when the forfeiture should begin to run; and a right to invoke the aid of the Supreme Judicial Court, by petition of any ten citizens of New Bedford or Fairhaven, to compel a compliance with the terms of the act. The latter was obviously the more direct and effective remedy in case it were desired as speedily as possible to ascertain the binding force of the statute, and at the same time to secure the establishment of the ferry, if found to be obligatory upon the company; and this remedy was promptly availed of. . . .

"Under these circumstances, the railroad company asks for a suspension of the forfeiture prescribed in the act. The grounds of the request are, in substance, that all the questions touching the obligation of the company to establish and maintain the ferry are in issue in the pending suit; that it has a just and constitutional right to have these questions judicially determined; and that it ought not, while in the due exercise of this right, and pending such determination to be amenable to an onerous and cumulative penalty as for a default in duty and a contempt of law. . . .

"It is evident that the General Court contemplated the probable occurrence of conditions under which it would be reasonable and proper to suspend the running of the forfeiture. Otherwise, express provision for such suspension would not have been made. The contingencies which were had in mind are not specified in the act. It is the duty of the board to discover as nearly as may be what the intent of the Legislature was, and to be guided by it in the exercise of the discretion to which appeal is now made.

"Two remedies were prescribed in the act, and express provision was made for the suspension of one of them. Why was this done? The suggestion that the forfeiture was meant to be

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suspended only in case of some accident or other miscarriage of such nature as to make it physically impossible to comply with the terms of the act, is not an adequate answer, because, in that view alone, both remedies should have been suspended. The more satisfactory solution appears to be, that, among other contingencies, it was distinctly foreseen and recognized that, in case the remedy by compulsory suit in equity were pursued, it not only would be superfluous, but might be oppressive, to enforce at the same time the forfeiture. This was the condition the most likely to arise under the statute; and, as it seems to the board, it must have been one, and perhaps the most cogent, of the contemplated reasons or occasions for the suspension of the forfeiture.

"By the prescription of two remedies, — the most stringent known to the law, but unlike in their character and appropriate use, — it was doubtless intended to provide for every phase which the subject matter was likely to assume. The one remedy was designed and adapted to supplement the other. In case the obligation to provide and operate the ferry were not called in legal question by the railroad company, or had been established beyond question by judicial decree, the heavy forfeiture prescribed, accumulating at the rate of $36,500 a year, was deemed a suitable penalty for a wilful neglect or contumacious refusal to obey the legislative or judicial mandate. If, on the other hand, the legal obligation of the company were strenuously denied, and resort were had to the court to settle and enforce by summary procedure the rights and duties of the parties under the statute, — as there was good reason to expect would be, and as has been, the case, — it cannot be justly supposed that there was any purpose to deprive the respondents of a full and fair opportunity to be heard, or to subject it to an accruing penalty, as for an established and current offence, while seeking by constitutional methods and in due course of law to ascertain whether or not an offence exists. If there were otherwise room for doubt, a fair interpretation of the language of the statute disproves such intention.

"It is therefore deemed to be in harmony with the just purpose of the Legislature, and within the scope of the discretion given to the board, to postpone the running of the forfeiture for

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a period which, as now appears, may be sufficient for the determination of the pending suit; giving the parties leave to apply respectively for further postponement, if hereafter shown to be necessary and proper, or for a vacation of the order now granted, if there should appear to be obstruction or undue delay on the part of the respondents in the prosecution of the suit."

Then followed the order which was sought to be quashed.

Hearing before *Morton*, J., who, at the request of the parties, reported the case for the consideration of the full court; such order to be made as law and justice might require.

T. M. Stetson & L. Le B. Holmes, for the petitioners.

J. H. Benton, Jr., for the Railroad Commissioners.

FIELD, C. J. Without considering the various technical objections made to the maintenance of this petition, and assuming for the purposes of the case in favor of the petitioners that St. 1894, c. 392, is constitutional, we deem it proper to express our opinion upon what may be called the merits of the case. There is nothing in this statute which limits the authority of the railroad commissioners in the matter of granting further time to the railroad company for beginning the operation of the ferry to proceedings begun before August 1, 1894, or which requires the order of the railroad commissioners granting further time to be made before August 1, 1894, and we are of opinion that the statute was intended to give to the railroad commissioners power to grant further time on a petition filed after August 1, 1894. The order actually passed by the railroad commissioners is dated October 29, 1894; it was passed on a petition of the Old Colony Railroad Company, filed September 29, 1894, and is as follows: "Ordered, that, under and pursuant to the provisions of section 2 of the act aforesaid, the first day of February, 1895, be prescribed as the day after which, instead of after the first day of August, 1894, the said Old Colony Railroad Company shall forfeit to the Commonwealth one hundred dollars a day for each day's delay in operating a ferry across the Acushnet River between the city of New Bedford and the town of Fairhaven, as provided in said act; with leave to the petitioner to apply for further postponement of time, and with leave to any ten or more citizens of said city or town to apply for a vacation of this order,

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for respective cause shown, and after notice and hearing on such application."

On examining the whole return of the railroad commissioners, there is some reason to believe that they thought that they could grant further time, so far as concerns the incurring of forfeitures, without granting further time so far as concerns the enforcement in equity of the specific duty of operating the ferry, and that they intended to grant further time to the railroad company only so far as concerns the incurring of forfeitures, in order that the company might try without the risk of incurring forfeitures the constitutionality of the statute in the petition in equity referred to in the report, which had been brought to enforce the provisions of the act. That petition was filed on August 18, 1894, and is still pending. We are of opinion that the statute was not intended to authorize the railroad commissioners to make any such discrimination. The intention was that the railroad commissioners might grant further time for delay in operating the ferry, if they thought that, after a hearing, it should be granted, but further time, if granted, must be granted for all the purposes of the statute, and the grant would operate to excuse the railroad company from operating the ferry within the time granted, whether a suit should be brought for the recovery of forfeitures or for the specific enforcement of the other provisions of the act. But whatever may have been the reasons why the railroad commissioners passed the order in the form they did, the order must be construed according to its terms when taken in connection with the petition on which it was made and with the subject matter. The petition of the Old Colony Railroad Company requested the railroad commissioners, after a hearing, to "prescribe such further time for delay in operating a ferry between New Bedford and Fairhaven, under chapter 392 of the Acts of the year 1894, as may appear to you [the Railroad Commissioners] to be reasonable." The order, therefore, must be construed either to relate solely to forfeitures, in which case it would be altogether unwarranted, or to grant delay in operating the ferry for all purposes up to February 1, 1895. We are inclined to give to it the latter construction, and so construed we think that it was within the authority intended to be given to the railroad commissioners. The present case

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was heard by the full court on January 18, 1895, and it was apparent then that a decision could not be had before February 1, 1895, when the time limited in the order expired, unless there should be a "further postponement of time." We have no knowledge that the time has been further extended, or that there has been any application for that purpose. The Old Colony Railroad Company is not, strictly speaking, a party to this proceeding, and the Commonwealth is not, unless the petitioners be considered as representing the Commonwealth. We therefore express no opinion upon the constitutionality of the statute, or whether forfeitures can be recovered by a petition in equity brought by ten or more citizens of the city of New Bedford or of the town of Fairhaven. As the order was made on a petition filed after the petition in equity was brought, and as the time limited in the order has expired, we see no reason why these questions cannot be determined in the petition in equity.

The present petition must be dismissed, without prejudice to the other proceedings. *So ordered.*

TREMONT AND SUFFOLK MILLS *vs.* CITY OF LOWELL.

Middlesex. January 18, 21, 1895. — March 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Valuation of Mill Property for Purposes of Taxation.

In valuing the real property of a manufacturing corporation for taxation, when the land must be valued exclusively of the buildings and the buildings exclusively of the land, it is erroneous to value the land as if the buildings were removed from it and then to value the buildings as if they were to remain upon it, if the sum of the values thus obtained is greater than the fair cash value of the land and buildings taken together in the condition they were in at the time to which the valuation relates.

FIELD, C. J. The petitioner, a manufacturing corporation organized under the laws of this Commonwealth and owning and occupying mills in the city of Lowell, appealed, pursuant to St. 1890, c. 127, to the Superior Court for the purpose of obtaining an abatement of the taxes assessed upon its land, buildings,

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and machinery in said city. The statutes require that the assessors shall enter the valuation and assessment of estates on the books furnished in accordance with the provisions of Pub. Sts. c. 11, § 53, in the following manner: "In column Number Seven, The true value of machinery used in all kinds of manufacturing establishments," etc.; "In column Number Fifteen, The true value of buildings, . . . including water wheels; such value to be exclusive of land and water power and of the machinery used in said buildings"; and "In columns Number Sixteen, Seventeen, and Eighteen, A description by name or otherwise of each and every lot of land assessed, . . . and the true value thereof." The assessors are required to put down "The value of real estate, specifying the value of buildings exclusive of land, and of land exclusive of buildings." Pub. Sts. c. 11, §§ 13, 20, cl. 2, 50–54. St. 1886, c. 56. St. 1887, c. 86. By Pub. Sts. c. 11, § 45, the assessors are required to "make a fair cash valuation of all the estate, real and personal, subject to taxation therein." Under Pub. Sts. c. 11, § 69, a person is entitled to an abatement of his taxes "if he makes it appear that he is taxed at more than his just proportion, or upon an assessment of any of his property above its fair cash value." By St. 1885, c. 355, assessors are to be punished if they knowingly fix the valuation of any property at less or more than "its full and fair cash value."

The principal question in the exceptions in this case is, What is the standard or test whereby the fair cash value of land and of buildings affixed to land is to be determined when the valuation of the land is to be made exclusively of the buildings and the valuation of the buildings is to be made exclusively of the land. The dominant intention expressed in the statutes is, that every person shall be taxed upon a valuation of all his real property in the Commonwealth at the fair cash value of it in the condition it is in at the time as of which the valuation is made. *Lowell* v. *County Commissioners*, 152 Mass. 372, 384. Gen. Sts. c. 11, § 34, required that the list of the valuation and assessment of estates shall contain in separate columns certain particulars, among which are the description of the real estate, the true value of it, and the taxes assessed upon it, but a separate valuation of the land and of the buildings was not required.

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St. 1861, c. 167, first required a valuation of the buildings to be made exclusively of the land. The act is entitled "An Act to secure a uniform description and appraisal of estates in the Commonwealth for the purposes of taxation," and it required the Secretary of the Commonwealth to furnish blank-books containing certain specified columns and tables to the cities and towns for the use of the assessors. The assessors were required to fill up the table of aggregates, and to deposit an attested copy of it in the office of the Secretary "on or before the first day of October in each of the first four years of each decade," and to make similar returns "in the first four years of the last half of each decade," and to deposit "in every fifth and tenth year of each decade" in said office "before the first day of October a certified copy under oath of the assessors' books for those years." § 3. See Pub. Sts. c. 11, §§ 53, 55, 57. One purpose of these requirements was undoubtedly to obtain statistics of the kind and value of the property in the Commonwealth, and another was to establish uniformity in the proceedings of the assessors; see Pub. Sts. c. 11, §§ 96, 97; but there is no indication anywhere that there was any intention of valuing the property of any inhabitant at more or less than its full and fair cash value. Pub. Sts. c. 11, § 59.

The Constitution requires the assessment to be proportional and reasonable, and that, in order that "such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth taken anew once in every ten years at least, and as much oftener as the General Court shall order." Const. Mass. c. 1, § 1, art. 4. Equality in the assessment can be attained only by a valuation of all the property taxed according to the same standard of value, and the standard which has been adopted is the full and fair cash value of the property. This value is necessarily to be estimated with reference to any and all the uses to which the property is adapted in the hands of any owner. It often happens that a lot of land with old buildings upon it is worth as much, or nearly as much, without the buildings as with them; that the most profitable use the land can be put to is to remove the old buildings and build new ones; and that in order to do this the old buildings must be torn down at an expense nearly equal to or more than the value of the materials of the

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buildings. Considered as a whole, the buildings add little or nothing to the value of the land. For certain purposes the buildings have value; they have an insurable value, but a building is insured on the assumption that it will not be removed from the land on which it stands. But the buildings, for the purposes of taxation as real estate, are in legal contemplation a part of the land. *McGee* v. *Salem*, 149 Mass. 238. Separated from the land, the buildings may have little or no value; if allowed to remain on the land, they may have great value, and as the value of the land and buildings for the purposes of taxation must be estimated with reference to all practicable uses to which they may be put by the owner or by any person who may become the owner, it often must be necessary to determine whether the best or most profitable use of the whole property is to remove the buildings or to permit them to remain.

The exceptions recite as follows: "At the close of the evidence the respondent contended and asked the court to rule, as matter of law, that in fixing the value of the petitioner's real estate inside its mill yards, the proper method was to estimate and fix the value of the land considered separately and independently of all the buildings and other structures thereon, and as though said buildings and structures were in fact severed and removed from the land, and independently of the particular uses to which said land was devoted, but having regard to its location, area, actual physical formation, availability for general building purposes, and to its water power appurtenances, and then to add to such value so determined the value of the buildings and other mill structures thereon, estimated and determined with reference to their age, adaptability to the purposes for which they were designed, and their actual condition as of May 1st, 1889."

The contention of the respondent in effect is, as we understand it, that, since the land must be valued exclusively of the buildings, the land must be valued as if the buildings were removed from it, even although this value should amount to the whole value of the land and buildings taken together, and that the buildings must be valued, not as buildings to be immediately removed from the land, in which case they might be worth little or nothing, but as buildings which might remain on the land, and with reference to the uses which might be made of them if

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they remained. If the best or most profitable use the land can be put to is to tear down the buildings and build new ones, and if the value of the land is estimated with reference to this use, — and if the best use the buildings can be put to is to permit them to remain on the land and be occupied or let, and if the value of the buildings is to be estimated with reference to this use, — the result would be that the land and buildings are valued with reference to uses which are inconsistent with each other, and the total valuation would be greater than the fair cash value of the whole property, or than the price at which it could be sold, if sold at a fair price, whether the land and buildings were sold separately or together. The buildings cannot at the same time be removed from the land and remain on the land. It cannot be that any such result was intended by the statutes. Whatever may have been the purpose of requiring the component parts of any parcel of real estate to be valued separately, we think that it was not the intention to value any such real estate, considered as a whole, at more or less than the full and fair cash value of it in the condition it was in at the time to which the valuation relates.

What the principles are on which the fair cash value of the whole parcel should be divided between the land and the buildings, and what should be regarded as belonging exclusively to the land and what to the buildings, may present in many cases questions of difficulty on which differences of opinion must exist. As buildings affixed to land can be taxed as real estate only in connection with the land, it usually makes no difference to the owners in the amount of their taxes how the division of value between the land and the buildings is made. It may be suggested that, as the person taxed can appeal from the assessment on certain parcels of real estate without appealing from the assessment on other parcels, where the assessment is on separate parcels, the same rule should apply to the separate assessments on the land and on the buildings which constitute one parcel, and that when these are assessed separately the person taxed thus has his election to appeal from the assessment on the land or on the buildings, and may thus select the particular assessment which he thinks shows an overvaluation without including the other, and in this manner obtain an abatement of the taxes on the assessment selected, although the whole parcel, including land and buildings, has not been overvalued.

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It has been decided that when different parcels of real estate belonging to the same owner are separately valued and assessed, and the owner applies for an abatement of the taxes assessed on certain specified parcels, but not on all, he can obtain an abatement if he proves that the assessments complained of were made upon an overvaluation of the specified parcels, although the other parcels were undervalued. The inquiry is not open whether the other parcels have been undervalued in order to make a set-off or defence against the assessments complained of. *Lowell* v. *County Commissioners*, 3 Allen, 546. *Lowell* v. *County Commissioners*, 146 Mass. 403. *Lowell* v. *County Commissioners*, 152 Mass. 372, 385. We are not aware, however, that it has ever been decided that a person can apply for an abatement of a tax assessed on land as distinguished from buildings, or on buildings as distinguished from land, when the land and buildings constitute one parcel of real estate, without including in the application the taxes assessed on the whole parcel, including the land and buildings. If this can be done, which we do not intimate, it would certainly enable the tax-payer to take advantage of the possibility that the appellate board or court might not make precisely the same division of the total value of the parcel between the land and the buildings as was made by the assessors, and thus in some instances obtain an abatement when the whole parcel has not been overvalued. In such a proceeding, if it could be maintained, it might be necessary to determine the principles on which the separate values should be ascertained. But no such question is involved in this case, which is an appeal for an abatement of the taxes assessed on all the land, buildings, and machinery of the petitioner in the city of Lowell.

Nor is it necessary now to attempt to lay down any definite rules for the valuation of land exclusively of buildings, and of buildings exclusively of land, which may be applied to every possible case. The only rule necessary to the decision in this case is, that the valuation of the land and buildings in the aggregate must be equal to the full and fair cash value of the whole parcel, including the land and the buildings as they exist at the time as of which the valuation is made, considered with reference to all practicable uses to which the parcel of land with the build-

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ings on it can be put. If one uniform rule is to be adopted, the simplest undoubtedly would be to estimate the value of the parcel with the buildings on it; and then to estimate the value of the land as if the buildings were removed from it, and make the difference the value of the buildings; but we express no opinion whether such a rule should be adopted.

Without considering these exceptions in detail, it is enough to say that we find no substantial error prejudicial to the respondent. *Exceptions overruled.*

F. P. Goulding & J. J. Hogan, for the respondent.

E. T. Burley, (*F. E. Dunbar* with him,) for the petitioner.

EDWARD H. NOBLE *vs.* PETER B. HAND & others.

Suffolk. January 23, 1895. — March 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Breach of Contract — Damages.

A. and B. executed a written agreement, by the terms of which A. was to sell samples of B.'s goods, and solicit orders for samples and for goods to be ordered from the samples, and was to receive a certain commission on the amount of all goods ordered from the samples, if the orders were not rejected by B., and the orders if not rejected in writing within ten days from their date were to be considered as accepted; and the agreement was to continue until such time as B. should discontinue the manufacture of the goods. B. ceased such manufacture and notified A., who, during the preceding two months, had sent B. orders for samples, which he neither filled nor rejected. *Held*, in an action by A. against B. for breach of the agreement, that he could recover nominal damages only.

CONTRACT, in three counts, against the administrators of the estate of William P. O'Brien, to recover commissions on sales of goods, and for breach of a written agreement. Trial in the Superior Court, without a jury, before *Dunbar*, J., who found for the plaintiff; and he alleged exceptions to the ruling on the question of damages. The facts appear in the opinion.

S. H. Tyng, for the plaintiff.

J. V. Beal, for the defendants.

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FIELD, C, J. The plaintiff made written agreements with the defendants, who, as administrators of the estate of William P. O'Brien, continued after his death to carry on his business, which was that of a manufacturer of shoes. By the terms of these agreements the plaintiff was to sell samples of the defendants' goods, and was to solicit orders for samples and for goods to be ordered from said samples, and was to receive a commission of two and one half per cent on the amount of all goods ordered from said samples, if the orders were not rejected by the defendants. It was agreed by the parties at the trial that the court might find for the plaintiff upon the first and second counts in the sum of $325.79, as the balance due the plaintiff for his commissions on orders for samples and goods which had been received by the defendants and filled by them. The only dispute between the parties arises under the third count, which relates solely to the agreement dated February 1, 1893. Under this agreement the defendants could reject any order, but if not rejected in writing within ten days from the date of the order it was to be considered as accepted. This agreement was to continue from its date to May 1, 1893, or "to such time after May 1, A. D. 1893, as the estate of W. P. O'Brien shall discontinue the manufacture of goods." On October 18, 1893, the defendants ceased to continue the business, and on that day so notified the plaintiff. Between August 18, 1893, and October 18, 1893, the plaintiff sent to the defendants orders for samples which they neither filled nor rejected. The plaintiff contends that, if they had sent the samples so ordered, he might in consequence thereof have received from various persons orders for goods. The third count is for breach of the agreement, and under it the plaintiff seeks to recover commissions on such orders for goods as he probably might have received if the samples had been sent. On this count the court found a breach of contract by the defendants, and assessed damages for the plaintiff in the sum of one dollar. The plaintiff's evidence showed no contract with anybody to give orders for goods if these samples had been sent, and no negotiations with any person for such orders based upon the sending of such samples, but only tended to show a probability that he might have received orders for goods from somebody if the samples had been sent.

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We think that there are two answers to the contention of the plaintiff that he is entitled to recover more than nominal damages. First, the defendants could have rejected in writing all orders for goods received after sending the samples, and it cannot be known that they would not have rejected all such orders if they had sent the samples ordered between August 18 and October 18, 1893; and secondly, whether such orders for goods would have been obtained, and, if so, to what amount, is too much a matter of conjecture to afford a basis for more than nominal damages. *Fox* v. *Harding*, 7 Cush. 516, 522. *Somers* v. *Wright*, 115 Mass. 292. *Brigham* v. *Carlisle*, 78 Ala. 243.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM A. MOSBY.

Suffolk. January 28, 1895. — March 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Threat to injure the Person of Another — Intent to extort Money — Statute.

A threat to arrest a person in a civil proceeding cannot be held to be a threat to injure the person of another, within the meaning of Pub. Sts. c. 202, § 29.

INDICTMENT, on the Pub. Sts. c. 202, § 29, in two counts. The first count alleged that the defendant, on February 10, 1894, feloniously, knowingly, wilfully, and maliciously did "threaten an injury to the person of one Lydia A. Williams, to wit: to arrest, imprison, and take into custody, and cause to be arrested, imprisoned, and taken into custody, the body of her, the said Lydia, by then and there feloniously, knowingly, wilfully, and maliciously sending and causing to be sent to the said Lydia" with intent thereby to extort money from the said Lydia A. Williams, the following written communication:

"Boston, February, 1894. Mrs O. Williams: Madam: We cannot state that you are directly or indirectly mixed in Messrs Rogers and Gardner affairs and we should be oblige to have your statement verbally, as we do not know you or unless your statement was taken before some lawyer as we stated before you are

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placed in a very bad position in not making them pay you, from investigation you have no one but your self to assist you in paying your rent & etc. and how can you afford to rent to them and simply take their statement, they have property of which they could sold they been at 564 Shawmut Ave Three months, both of them are slick people, and I am affraid they get you into troble yet, they will unless they settle this bill for if we send for them to attend meeting in New York & neither Mr Gardner or his Representive appear Gardner will be brought on and of course we will have to summonds you and if you fail to come we will have to arrest you, If Mr Gardner was to take is representive advice or you also, you be better off as he know just how they stand of course if you are sent for you cannot tell how long you will have to remain if we were to hold Mr Gardner and Rogers you have to remain also untill the case was over if it took a month unless some one could furnish bail. I simply write you facts as I think you have placed your confidence in the wrong persons this Mr Gardner especially. We are giving them time to settle up this affair but they got to exert them self.

"Mr Gardner and Mrs Rogers I shall frankly tell you that they have imprisiment for life hanging over their heads of which you may not be aware of if you did for to have to be such a witness you may feel ashamed. I cannot state how long you have to remain I write to you in behalf of Govement Prot Ass. John Bailey —"

The second count, which was otherwise identical with the first, alleged the sending of the following communication:

"Boston, Oct. 5th, 1894. Mrs Lidia Williams, Dorchester, Mass.: Madam, your failing to fulfill your part of agreement of the 4th inst. will neccestiate your appearance before whole board at New York, N. Y. on account of G. W. Williams Att. whom have forward his amount to Grand Chief and of whom notifies you to appear to give reason why said bill of said thirty Days has not been paid, either your Attorney or representive must be here tomorrow noon, you will also be charged for this summonds

Two Dollars $2.00

whole bill Three Dollars — you having received full acquittal from said Society under circumstances of case James H. Gardner & Mrs M. P. Rogers of said 581 Shawmut Ave, said Boston

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Massachusetts Whom said James H. Gardner and M. P. Rogers appear in said New York to give explantion through G. W. Williams. Fail to appear or to have your Attorney or representive there at your peril. As we shall be oblige to arrest you as these cases we do not intend to carry over this week. We must know tonight what is to be done if we don not here from you will be oblige to send man. Yours Respectfully, Dective Geo. H Hardrey, Returnable at 10 o'clock — "

In the Superior Court, before the jury were impanelled, the defendant moved to quash the indictment, for the reason that the alleged threats contained in the letters set forth in the indictment were not threats to injure the person of Lydia A. Williams. *Bishop*, J. ruled that a statement or threat to a person that he must appear as a witness or that he will be compelled to do so by legal process is not a threat within the meaning of the statute; that to come within the statute a threat must be of physical injury to the person threatened; and that the jury would be at liberty to find that such injury was intended from the whole language of the letters, notwithstanding the word "arrest" was used; and upon this ground overruled the motion to quash, and submitted the case to the jury with the instructions indicated in the ruling.

The jury returned a verdict of guilty on both counts; and the defendant alleged exceptions.

F. S. Goodwin, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

FIELD, C. J. The question in this case is whether the letters set out in the indictment contain threats to injure the person of Mrs. Williams, within the meaning of Pub. Sts. c. 202, § 29. The threats, as we construe the letters, are to arrest her on some process in order to compel her to appear in New York, either as a witness in some proceeding against other persons, or as a defendant in some proceeding against her to collect a debt. The indictment does not allege that the threats were to arrest her without legal process, or without lawful legal process, although it is difficult to conceive of any lawful legal process by which Mrs. Williams could be arrested in this Commonwealth for the purpose of compelling her to testify as a witness or appear as a

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defendant in any civil proceeding in New York. The section of the Public Statutes under which the indictment was drawn is said to have been taken from the statutes of the State of New York, and it is a provision found in the statutes of some other States. Commissioners' Report, Rev. Sts. note to c. 125, § 13. Rev. Sts. c. 125, § 17. Gen. Sts. c. 160, § 28. We have decisions which relate to that part of the section which forbids any one maliciously to threaten "to accuse another of any crime or offence," but we find none which construes the particular clause under which this indictment was drawn. It is plain, we think, that the section was not intended to include a malicious threat of bringing a civil suit against another, and we think that it cannot be held to include a threat to sue out any civil process against another. A threat to injure the person of another naturally means a threat to use actual physical force upon the person of another. This might be done under pretence of a fictitious legal process, or a process known to be void, but this indictment does not charge threats to make a false arrest. The threats are that, if Mrs. Williams does not appear either as a witness or as a defendant, she will be arrested and compelled to appear, but there is no allegation that this was to be done by an illegal or void process. It has been said that a threat to arrest a person on a charge of crime is not a threat to injure the person of another, and we think that a threat to arrest a person in a civil proceeding cannot be held to be a threat to injure the person of another. See *Embry* v. *Commonwealth*, 79 Ky. 439. *Britt* v. *State*, 7 Humph. 45.

Exceptions sustained.

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ISAAC KAFFENBURG & another, assignees, *vs.* PHILIP ASSNER.
SAME *vs.* JOSEPH NAVISKY.

Suffolk. January 28, 1895. — March 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Allowance to Insolvent from Partnership Assets — Appeal to Superior Court.

The Superior Court has no general supervisory authority over the proceedings of courts of insolvency such as is given to the Supreme Judicial Court by Pub. Sts. c. 157, § 15; and, while in certain cases the right of appeal to the Superior Court is given, as in Pub. Sts. c. 157, §§ 36, 91, there are no provisions of statute which give this right in the matter of granting an allowance to insolvent debtors.

APPEAL from a decree of the judge of insolvency making an allowance to each of two insolvent debtors out of the partnership assets.

The cases were submitted to the Superior Court, and, after affirmation of the decree of the Court of Insolvency, to this court, on appeal of the assignees in insolvency, upon agreed facts, the nature of which appears in the opinion.

G. C. Abbott, for the appellants.

W. F. Kimball, for the appellees.

FIELD, C. J. Philip Assner and Joseph Navisky were partners, and became insolvent debtors. There was no separate estate of either, but there was partnership property which came into the possession of the assignees in insolvency. The debtors each petitioned the Court of Insolvency for an allowance under Pub. Sts. c. 157, §§ 99, 123, and that court entered decrees making an allowance to each out of the partnership assets. The assignees appealed from these decrees to the Superior Court, where the facts were agreed, and that court affirmed the decrees of the Court of Insolvency, and the assignees appealed to this court. The appellees contend that no appeal lies to the Superior Court from such decrees of the Court of Insolvency. The Superior Court has no general supervisory authority over the proceedings of courts of insolvency, such as is given to the Supreme Judicial Court. Pub. Sts. c. 157, § 15. In certain cases the right of appeal to the Superior Court is given; Pub.

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Sts. c. 157, §§ 36, 91; but we have found no provisions of statute which give this right in the matter of granting an allowance to the debtors. These appeals must be dismissed, with the direction to the Superior Court to dismiss the appeals to that court.

So ordered.

HIRAM A. MARSTON *vs.* SINGAPORE RATTAN COMPANY.
SAME *vs.* J. GARDNER CURTIS & another.

Middlesex. November 13, 1894. — March 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Contract — Breach — Rescission — Damages.

If a person conveys property to another under an agreement, the terms of which are subsequently broken by the latter, and the former has enjoyed the benefit arising from the transaction for a period of several months, and the parties cannot be restored to their original positions, the former cannot rescind the transaction and recover the value of the property conveyed, but can only recover damages resulting from the breach of the agreement.

TWO ACTIONS. The first case was an action of contract or tort, in three counts; and the second case, which was against J. Gardner Curtis and Alonzo V. Lynde, was an action of contract, in two counts. The cases were tried together in the Superior Court, before *Bond*, J., who directed the jury to return a verdict for the plaintiff in each case, except upon one count in the first case; and the defendants alleged exceptions. The facts appear in the opinion.

W. G. Russell & J. Fox, for the defendants.

S. J. Elder & W. C. Wait, for the plaintiff.

FIELD, C. J. These two actions were tried together. At the close of the evidence the court, after declining to direct a verdict for the defendants upon each and all the counts in both actions, submitted in all five questions to the jury, which they answered. The presiding justice thereupon directed the jury to return a verdict in the first case against the defendant on the first and second counts for $13,300, with interest from the date

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of the writ, and a verdict for the defendant on the third count, and also directed the jury to return a verdict in the second case against the defendants for the same sum of $13,300, with interest from the date of the writ; and verdicts were returned accordingly. This was done against the objection and exception of the defendants in each case. The jury found in each case that the net value of the property conveyed by the plaintiff to the defendant company above the liabilities assumed by the company was $13,300. The main question raised by the exceptions, and the only question argued by the defendants, is whether, upon the findings of the jury and the admitted facts, the court was warranted in directing the verdicts for the plaintiff for the amount stated. The argument is, that in neither case is the verdict a necessary conclusion of law from the facts found and admitted. The verdicts must have been ordered on the theory that what is called the net value of the property conveyed by the plaintiff to the company was the true measure of damages in each case. The breach of agreement found by the jury was discharging the plaintiff from his position of manager of the business of the company, in violation of the agreement found to have been made with the plaintiff by the company and by Curtis and Lynde to elect and continue him as manager until such time as he and the company should mutually agree to terminate the relation. In the first case, the verdict ordered for the plaintiff on the first and second counts must have been ordered on the theory that it appeared by the findings of the jury and the admitted facts, that the plaintiff had a right to rescind the transaction whereby he transferred his property to the company in reliance upon the agreement to elect and continue him as manager. It appears from the exceptions, that the evidence was that the certificate of incorporation of the company is dated December 11, 1890; that the plaintiff's property was conveyed to the company on January 20, 1891; that the plaintiff was made manager, and continued to act as manager until September, 1891, when he was discharged; and that on October 2, 1891, the plaintiff demanded from the company a return and reconveyance of the net amount of property conveyed by him to the company, or payment of the same, and then brought these suits. The property conveyed consisted of real estate,

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merchandise, tools, fixtures, book accounts, etc., and the liabilities of the plaintiff which were assumed by the company were mortgages on the real estate, accounts payable, notes payable, etc. It does not appear that this property remained the same from the time of the conveyance up to the time of the demand. Although the net value of the property of the plaintiff conveyed to the corporation is found to be $13,300, the capital stock of the corporation was $42,000. Lynde testified that the plaintiff owed him at the time of the formation of the corporation $5,000, and that he took fifty shares of stock therefor. Curtis testified that at the same time the plaintiff owed him $17,116.87; that he, Curtis, agreed to furnish money or merchandise to make up his debt to $20,000, for which he was to receive two hundred shares of stock, and that ultimately he furnished merchandise so that his whole debt amounted to $24,600 for which he received two hundred and forty-six shares of stock; that one hundred and twenty shares of stock were allotted to the plaintiff, which were put in the name of Curtis as trustee for the plaintiff under an agreement signed by Curtis, Lynde, and the plaintiff, and one share was put in the name of each of four other persons, making all the shares issued four hundred and twenty. A statement of the value of the whole property made by the plaintiff just before the organization of the corporation was: assets, $49,535.16; liabilities, $34,706.40; leaving the net value $14,828.76. The liabilities, exclusive of $10,000 secured by two mortgages on the real estate, were estimated by the plaintiff then to be $24,706.40. A second statement made by the plaintiff, on December 15, 1890, made the net value $13,913.55. This was afterward cut down by certain deductions, and the plaintiff testified that "at last I consented to call my equity in the property $12,000." This equity he testified, against the objection of the defendants, was worth $13,300 at the time he made the conveyance to the company, and he also testified, against the same objection, that the "value of the property taken in connection with the business which he was conducting" was $18,300. Some of the debts of the plaintiff must in the course of the business which he managed have been paid by the company, and merchandise was bought and sold, and it must in the nature of things have been impossible, at the time the

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plaintiff made the demand for a reconveyance, to put the parties into the same positions as they were in when the conveyance was made, or when the agreement was made for the formation of the corporation and for the conveyance to it of the plaintiff's property. The plaintiff does not seriously contend that the parties could be put into their original positions; he contends that, on his releasing to the company all his interest in it, the company on the facts found and admitted was bound to pay to him what he calls the net value of the property conveyed, which is the value of the property conveyed above his liabilities which the company assumed. These liabilities, on this theory, if not actually already paid off by the company, must be paid off by the company in the future. The exceptions recite that "the plaintiff in court offered, during his case, and at the end of the second day's trial, to execute a release in any form desired of his rights in the stock and business and under the agreement of January 20, and defendant refused to accept any release whatsoever, and at the close of his case plaintiff tendered the release, a copy of which is annexed, and defendant refused to accept the same." This release is dated March 3, 1893, and is a release to the company, its successors and assigns, of "any and all interest which I may now have, or which I had on the 18th day of September, 1891, or upon the 2d day of October, 1891, in any stock of the company issued to J. Gardner Curtis as trustee for me in any way." The agreement of January 20 referred to is the agreement dated January 20, 1891, signed by Curtis, Lynde, and the plaintiff, which provided, among other things, that the certificates of stock should be distributed in certain proportions, and that the twelve thousand dollars' worth of stock allotted to the plaintiff should be put in the name of Curtis as trustee for account of the plaintiff, to be held by Curtis "as collateral for said Curtis and said Lynde as their interests may appear, and to be turned over to" the plaintiff on December 12, 1891, in case a dividend of six per cent is earned and paid on the stock from December 17, 1890, to December 12, 1891, and the provision is that if said six per cent yearly dividend is not earned and paid, "the said twelve thousand dollars in stock held by said Curtis as trustee shall revert to said Curtis and Lynde as their interests may appear." Under this

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agreement, it may be somewhat difficult to determine what interest in this stock would have been conveyed by the plaintiff to the company if it had accepted the release.

In the action against the company, the third count, on which the court directed a verdict for the defendant, was a count for damages for the breach of the agreement to employ the plaintiff as manager until such time as the plaintiff and defendant should agree that this employment should cease.

In the action against Curtis and Lynde, the first count alleges the promise to employ the plaintiff as manager, the formation of the company, the conveyance of his property to the company in reliance on this promise, and the making of the agreement of January 20, 1891, and it also alleges that the defendants, "being still holders of a controlling interest in the capital stock of said company, conspiring to deprive the plaintiff of his said business, to render worthless his interest in said company, and to render impossible the performance by the plaintiff of the things to be performed by him under the provisions of said written agreement so as to prevent him from acquiring his stock in said company, procured the plaintiff's discharge from his position as manager of said company, and wrongfully caused him to be prevented from performing his duties as treasurer of said company." The conclusion of the count is as follows: "The plaintiff, having surrendered to the defendants any interest he may have under said agreement, says the defendants owe him the value of the property which he so conveyed at the defendants' instance and request, and in reliance upon their said promise." The second count is, in substance, that the defendants owe the plaintiff the value of the property conveyed to the company at their request and upon their promise "to elect and maintain him as manager of said corporation until such time as he and said corporation should agree that he should cease to be such manager," which promise the defendants, "without cause and without his consent, have totally violated and broken."

It thus appears that the two actions differ essentially in this, that the company received the conveyance of property from the plaintiff, and has had the use of the property, but that Curtis and Lynde received no property from the plaintiff; they re-

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ceived their shares of stock from the corporation, and Curtis received as trustee the one hundred and twenty shares allotted to the plaintiff, to be held by him under the agreement of January 20, 1891.

We do not construe the first count in the action against Curtis and Lynde as a count on the written agreement of January 20, 1891, but we regard the allegation in this count concerning that agreement as an allegation tending to show special damage which the plaintiff has suffered by reason of being discharged from his position as manager. The damages resulting from this discharge, we think, upon any view of the cases, are not necessarily the same as the net value of the property when conveyed by the plaintiff to the company, more than eight months before his discharge. We deem it impracticable to attempt now to lay down the rule of damages, particularly with reference to all the collateral contracts into which the plaintiff has entered, but even if it should be assumed that the damages might include the whole value of the plaintiff's interest in the corporation and its business at the time of his discharge, that value is not necessarily or probably the same as what is called the net value of the property conveyed, and Curtis and Lynde can be held liable to the plaintiff on the breach of their promise only for the damages which resulted from the breach; in no event can they be compelled to restore the property conveyed, or the value of the property, because they never had it, and the contract of conveyance was not with them, but with the company. On the case against the company, we are also of opinion that the evidence does not show a case where rescission is possible, and that the claim must be not for the net value of the property conveyed, but for the damages resulting from the breach of the promise to elect and continue the plaintiff as manager. There was no fraudulent misrepresentation of existing material facts in reliance on which the conveyance was made. There was a breach of a promise to do something in the future. This promise was not the whole consideration of the conveyance of the property. Curtis and Lynde had united with the plaintiff in forming a corporation; both Curtis and Lynde had taken shares of stock in it up to the amount of the plaintiff's indebtedness to them respectively, and Curtis had also furnished goods to the corpo-

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ration in payment of additional shares of stock; one hundred and twenty shares of stock had been allotted to the plaintiff, and there was evidence that the plaintiff's indebtedness had been assumed by the corporation. The plaintiff has enjoyed the benefit of this transaction for more than eight months before his discharge, and the parties cannot be restored to their original positions. Under these circumstances, the plaintiff cannot rescind the transaction and recover the value of the property conveyed, but can only recover damages resulting from the breach. *Snow* v. *Alley*, 144 Mass. 546. *Black* v. *Ridgway*, 131 Mass. 80. *Bassett* v. *Percival*, 5 Allen, 345. All of the verdicts ordered in these cases, including the verdict for the defendant company on the third count in the first case, must be set aside, as well as all of the answers to the questions submitted to the jury.*

So ordered.

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* These questions were as follows:

"1. Did the defendants Curtis and Lynde enter into an agreement with the plaintiff that, if he would convey his business and property to the Singapore Rattan Company, they would elect and maintain him as manager of said company until such time as he and the corporation should mutually agree to terminate the relation?

"2. Did the Singapore Rattan Company after its formation adopt or make an agreement with the plaintiff that, if he would convey his business and property to it, it would elect and continue him as manager until such time as he and the corporation should mutually agree to terminate the relation?

"3. Did the plaintiff make the conveyance to the Singapore Rattan Company, relying upon the agreements for management named in the first and second interrogatories?

"4. Did the defendants discharge the plaintiff and prevent him from performing his duties as manager of the company without just cause?

"5. What was the net value of the property conveyed by the plaintiff to the Singapore Rattan Company above the liabilities assumed by the company?"

The jury answered each of the first four questions in the affirmative; and to the fifth question they answered, "$13,300."

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INHABITANTS OF MELROSE *vs.* IRA HILAND.

Middlesex. November 19, 1894. — March 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Maintenance of Drain — Town — Contract — Fraud — Action — Ratification of Act of Selectmen.

A town has power to widen a common drain, or to clear it from obstructions, although it is upon private land and outside the limits of any highway.

The town of Melrose is bound to maintain and keep in repair, within its own limits, the drain made by the county commissioners under the authority of St. 1869, c. 378.

If county commissioners lay out a common drain twelve feet wide in a town, but actually build it at a certain place therein only eight feet wide, the town has power to enlarge the drain to the width of twelve feet, if such enlargement is reasonable and necessary for the purpose of proper drainage.

It is lawful for a town to take from the owner of land therein, through which a common drain is laid, an agreement for reimbursement of the cost to the town of enlarging the drain on his premises.

The bringing of an action by a town upon an agreement, taken by its selectmen from the owner of land therein through which a common drain is laid, for reimbursement of the cost to the town of enlarging the drain on his premises, is sufficient evidence of acceptance of the agreement, and of a ratification of the act of the selectmen in taking it.

CONTRACT, to recover the amount expended by the plaintiff town, at the defendant's request, in removing obstructions in a common drain called Ell Pond Brook upon the defendant's premises, in raising and supporting a building thereon, and in widening the culvert thereunder. Trial in the Superior Court, before *Dunbar*, J., who reported the case for the determination of this court, in substance as follows.

Evidence was introduced by the plaintiff tending to show that the county commissioners of Middlesex, under and by virtue of St. 1869, c. 378, and St. 1870, c. 228, which acts, it was admitted, had been accepted by the plaintiff, took and laid out Ell Pond Brook as a drain, from the southerly line of Wyoming Avenue, under the Boston and Maine Railroad and under the premises of the defendant and within the plaintiff town, at the width of twelve feet up to Ell Pond, and by their report ordered that the plaintiff town maintain and keep in repair that part within the limits of the town; that from below the defendant's

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premises up to Ell Pond the commissioners did not dig out and construct the drain of the full width of twelve feet; that prior to the doing of the work under the defendant's premises for which this action is brought, the drain did not carry off all the water, but it was dammed back at the defendant's premises in times of freshets, flooding the basement of the defendant's store and overflowing the streets above; and that at the town meeting in March, 1891, under the following article in the warrant, "To see what action the town will take in the matter of widening, deepening, and straightening Ell Pond Brook, enlarging the culverts over the same and removing any and all obstructions now existing therein," the town of Melrose passed the following vote: "That the selectmen be directed to cause and compel the removal of all obstructions and erections placed by any parties within the lines of Ell Pond Brook and drain as laid out by the County Commissioners, and hereafter prevent the placing of any obstructions in said drain; to widen where necessary, to allow the free flow of the water, the culverts under the roadways; to clear out the said brook or drain, and protect its walls by stones when necessary. . . . Also to secure by all proper means the enlargement, if deemed necessary by them, of the brook and drain under any building or erection within the lines of the layout by the County Commissioners."

There was further evidence tending to show that the selectmen proceeded under the above vote to widen the culverts under the highways, and to secure the removal of all obstructions within the lines of the twelve feet as laid out under the defendant's building and the Boston and Maine Railroad premises, just below the defendant's premises; and that on July 10, 1891, they caused a letter to be written by their chairman to the defendant, notifying him of the above vote, and of their intention to proceed under it, and stating "that work will be commenced by the contractors as soon as possible, and it is desirable to know whether you wish to do the work which comes under your building yourself in your own way, and so that it may correspond with the plans of Walter C. Stevens, civil engineer of the town of Melrose, or whether you would prefer to have the work done by the contractors to whom we shall award the contract, you paying your proportionate part of the cost of the work"; that Levi S.

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Gould, the chairman of the board of selectmen, had an interview with the defendant, and said to him that it was necessary to have all the obstructions removed, and the walls of the culvert built to the full width of twelve feet to allow the water to flow off, and that the selectmen would be glad to have the defendant do the work in conjunction with the town, or that the town would do the work if the defendant would pay his proportionate part for the work done on his premises; that the defendant desired to know how much the amount would be, and Gould said he would ascertain; that on July 13 he wrote to the defendant informing him that his proportion of the cost of the work would be $350, and requesting him to state whether it was satisfactory, and whether he would authorize the selectmen "to go on with the work"; that he received in reply from the defendant a letter, acknowledging the receipt of Gould's letter, and further stating that "the same is satisfactory to me, and I agree to pay the sum of three hundred and fifty dollars, $350, therein named on completion of the work in a manner satisfactory to the engineer of the town of Melrose, Walter C. Stevens"; and that subsequently, after the work was finished, Stevens, the engineer, put the following certificate on the back of the agreement: "I hereby certify that the work done on the culvert, under the building at Wyoming owned by Ira Hiland, is done to my satisfaction."

There was also evidence tending to show that the contractor to whom the work was let refused to do the work; that Gould saw the defendant and informed him of that fact, and told him that the town would do the work under the superintendence of one Ellis, the highway surveyor, and would do the work under the defendant's premises, removing all the obstructions, and construct the drain to the full width of twelve feet, keeping an account of the expense of the work done on his premises, if he would agree to pay the town the amount expended by it thereon, which he assented to and agreed to do; and that, on this understanding, the selectmen decided to do the work, and ordered it done under the superintendence of the highway surveyor, and approved the bills.

It was also in evidence, that, about the time the work was to be begun under the premises of the defendant, he saw Ellis, and it

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being found that the sills were decayed and the building had settled down upon the culvert, it became necessary to raise the building; that the defendant tried to get a man to raise and support the building, but, failing to find him, he asked Ellis to get some raiser of buildings to come there and have the town raise the building as a necessary part of the work that was to be done, and said that he would pay the town whatever it cost to raise and fix the building so as to keep it up and make it firm; that Ellis replied that he had no authority, but would see the selectmen; and that he reported the matter to the selectmen, who consented to do the necessary work upon the agreement of the defendant to pay the town for the same.

There was also evidence that the defendant was present from time to time during the progress of the work, and expressed his approval of and satisfaction with the work as it was being done; that, when it was completed, the chairman of the board of selectmen sent to the defendant a letter, with a bill for $505.57 for the work so done; that he saw the defendant afterwards, and the defendant objected to paying the bill, and said he would pay $350; and that the defendant subsequently wrote him a letter containing the following: "I have always been ready and willing to pay what the contract calls for, providing the work was done according to the specifications and materials called for by the engineer of Melrose, Walter C. Stevens. I am not satisfied with the work, and cannot accept it as complying with contract and specifications."

It was in evidence that, prior to the doing of the work, the selectmen had been called to the defendant's premises by the flooding of the water therein owing to the obstructions which existed under the building and under the Boston and Maine Railroad. Evidence was introduced of the amount of money expended by the town in raising the building, putting in the trusses and sills under the same, and making the culvert the full width of twelve feet; and it was shown that the bills were approved by the selectmen, audited by the town auditor, and paid by the town.

There was evidence tending to show that the defendant's premises consisted of a wooden building, under which the brook ran, and a strip of land twelve feet wide between the building

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and Berwick Street, under which the brook ran under a covered culvert. It was admitted that the work was not done in accordance with the specifications of Stevens; and that he did not approve or accept the work upon and under the defendant's premises between his building and Berwick Street, but did accept that done under the building as satisfactory.

The defendant denied that he made the agreement as testified to by the plaintiff, and testified that the work done upon his building would not have been needed except for the work done in widening the brook under his store; that Gould told him that the whole job of clearing the culvert the full width of twelve feet, including that under his premises, was let to a contractor, and was to be done under the superintendence of Walter C. Stevens, the engineer of the town, and further told him, if he did not agree to do the work himself, that the town would do the work, and that he would be liable and be compelled to pay what the work under his premises should cost; and that the defendant, relying upon the statements of Gould, and also the statements in the letters of July 10th and 13th, wrote the letter and agreement above recited; and he contended, and offered evidence to show, that the work had not been done according to the specifications, and to the satisfaction of Stevens; and that the defendant had not waived either of those conditions.

At the conclusion of the evidence, the defendant requested the judge to rule that, "if any contract was shown by the evidence, it was a contract made by the defendant with Gould, and not with the plaintiff, and that, upon all the above evidence, the plaintiff was not entitled to recover"; and to direct a verdict for the defendant. The judge refused so to do; and the defendant excepted.

The judge instructed the jury, among other things, as follows:

"It will be necessary for the plaintiff, in order to recover, to satisfy you that the contract which it made with the defendant was substantially the contract relied upon in its testimony; and that the work was performed substantially in accordance with that contract. . . .

"We come then to the question, Was the agreement which was made by the selectmen with the defendant to do the work upon these premises, widen the brook under the premises, and

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do the other work which was done there, an agreement to do work which was reasonably necessary to carry out the purposes contemplated by this act of the Legislature, and contemplated by this vote of the town? The selectmen had authority under that vote to make a contract with the defendant that he should pay what it cost the town to do the work upon his premises, provided the work which was done was reasonably necessary to carry out the intention of the act, and of the town stated in this vote of the town meeting.

"Now, what was reasonably necessary? And that is a practical question. Was it reasonably necessary to widen the channel of the brook within the limits of the laying out? If it was, whatever work was done in the widening of the channel of that brook within the limits laid out by the county commissioners was proper to be done, if it was done with the consent of the defendant, as it is admitted here it was. Was it necessary to raise the building? If it was necessary to effectuate the purpose, then the building might be raised; and the expense thus reasonably incurred was a proper expenditure. . . .

"If the defendant made this contract to which I have referred, and if this work was done by the town, the town may recover for the work thus done. There is a further question in this case, and that is the question of ratification. It is claimed that there was no authority on the part of the selectmen to do this work. It appears that after the work was done — or there is evidence tending to show, I should say, that after the work was done — these bills were presented which were testified to by one of the witnesses, and there is testimony that those bills were paid by the town after the performance of the work. Now payment of the indebtedness incurred by the acts of an agent with knowledge of the facts is evidence from which the jury may infer that there is a ratification of the acts that the agent performed, and that is the application to be made of that principle in this case. . . .

"In order to recover in this case, the plaintiff must show that the work which was done there was done under and in pursuance of the contract made with the defendant, and of the request by him to do it."

The defendant requested the judge to add the following:

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"That the defendant's request to do the work when he was under the impression that he was obliged to do it, not leaving it to his own volition, would not form a contract with the town." The judge declined to make this addition; and the defendant excepted.

The defendant also excepted to the ruling that the town had authority to do the work.

The jury were directed to find, first, if the action of the selectmen in doing this work was ratified by the town; and, secondly, if they found a verdict for the plaintiff, to find specially what was the cost of the work done upon the premises of the defendant which was not reasonably necessary in carrying out the purpose stated in the act and in the vote of the town.

To the first question the jury answered, "Yes," and to the second, "Nothing"; and found for the plaintiff in the sum of $549.82.

If the ruling excepted to was wrong, or if any of the requests of the defendant which were refused should have been given, a new trial was to be granted; otherwise, judgment was to be entered on the verdict.

R. Lund, for the defendant.

F. S. Hesseltine, (*N. F. Hesseltine* with him,) for the plaintiff.

ALLEN, J. 1. The defendant contends that the town had no power to widen the drain or clear it from obstructions, because it was upon private land, and outside the limits of any highway. We cannot see how this fact makes any difference. Drains may be laid through private lands, as well as in highways. St. 1869, c. 111, § 1. Pub. Sts. c. 50, § 1. If a common drain runs through private land, the power and duty of the town to repair it are the same as if it were in a highway. *Bates* v. *Westborough*, 151 Mass. 174. Such power and duty might even be made to extend beyond the limits of the town. *Commonwealth* v. *Newburyport*, 103 Mass. 129. *Carter* v. *Cambridge & Brookline Bridge*, 104 Mass. 236. *Coldwater* v. *Tucker*, 36 Mich. 474. Dillon, Mun. Corp. (4th ed.) § 446.

2. The defendant further criticises the decision in *Melrose* v. *Cutter*, 159 Mass. 461, and contends that no power to repair this drain was given to the town by St. 1869, c. 378, and that the county commissioners alone had this power and duty, and could

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not delegate it to the town. The county commissioners were to do the work in the first instance, and might assess betterments on real estate; and by § 3 they were to assess the cost on the Boston and Maine Railroad, and on the towns of Malden and Melrose. The statute was subject to acceptance by the towns, and was in fact accepted by the plaintiff, and also no doubt by Malden; see *Cochrane* v. *Malden*, 152 Mass. 365, 366; though the latter fact is not expressly stated in this case. The declared object of the work was "for the purposes of proper drainage and the public health." It was designed to make a drain beneficial to both towns, as well as to the railroad, and to assess the cost in part upon real estate benefited, and upon the railroad company, and the rest upon the two towns. The statute was not very carefully drawn, and has been fruitful of litigation, and heretofore the court had occasion to say of it, "Much that is necessary in order to adapt the provisions of the General Statutes in substance and effect to the new conditions of this special act, must be left to necessary implication." *Phillips* v. *County Commissioners*, 122 Mass. 258. See also other cases growing out of this statute. *Phillips* v. *Middlesex*, 127 Mass. 262. *Cochrane* v. *Malden*, 152 Mass. 365. *Melrose* v. *Cutter*, 159 Mass. 461. It was not expressly declared in the statute how the drain should be maintained and repaired; but in *Melrose* v. *Cutter* we determined that the town within its own limits is bound to maintain and repair it. This would be clear under the decisions, if the drain had been originally laid out by the selectmen, under St. 1869, c. 111, § 1. It has often been held that after a drain has been built the care of it devolves upon the city or town, and the mayor and aldermen or selectmen in repairing it afterwards act as the agents of the city or town. *Child* v. *Boston*, 4 Allen, 41. *Emery* v. *Lowell*, 104 Mass. 13. *Murphy* v. *Lowell*, 124 Mass. 564. *Bates* v. *Westborough*, 151 Mass. 174. It would be a narrow construction of St. 1869, c. 111, § 1, and Pub. Sts. c. 50, § 1, to hold that this duty is limited to drains laid out by the mayor and aldermen or selectmen themselves. The work of making the drain could be more beneficially performed by the county commissioners; but, the drain being finished, it became a common drain, and was to be repaired like other common drains. We therefore remain satisfied with the decision in *Melrose* v. *Cutter*.

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The decision in *Cochrane* v. *Malden*, 152 Mass. 365, is not opposed to the view here expressed. It was there held that the town was not liable for the damages done by the setting back of the water, in consequence of a culvert's not having been enlarged; that the county commissioners had settled the proper size of the culvert, and that the town might rest on their decision. The ordinary repairs of the drain, and the power of the town to enlarge the culvert, if it had voted to do so, were not brought in question.

3. It seems that the county commissioners, although they laid out the drain as twelve feet wide, actually built it at the place now in question only about eight feet wide; and the defendant contends that the town had no authority to enlarge it to the width of twelve feet. But the power to repair includes the power to make such enlargement, if reasonable and necessary for the purpose of proper drainage.

4. It was lawful for the town to take an agreement from the defendant for reimbursement of the cost of doing the work on his premises. *Arlington* v. *Cutter*, 114 Mass. 344. *Springfield* v. *Harris*, 107 Mass. 532. Dillon, Mun. Corp. (4th ed.) § 458, and cases cited. The defendant now contends that the agreement was obtained from him by fraud, or at least that there was evidence of fraud for the jury. But no such question is open upon the report. The nearest approach to raising a question of fraud was in the request for a ruling "that the defendant's request to do the work when he was under the impression that he was obliged to do it, not leaving it to his own volition, would not form a contract with the town." This suggested no question of fraud. We may add, that we find in the report no evidence of fraud.

5. The defendant contends that the town did not authorize the selectmen to take an agreement from the defendant for reimbursement. The agreement was for the benefit of the town, and the bringing of the action upon it is sufficient evidence of an acceptance of it, and of a ratification of the act of the selectmen in taking it. See *Arlington* v. *Cutter*, 114 Mass. 344.

If the work done had been beyond the authority of the town, the question would still remain whether the defendant could avail himself of that ground of defence. This question we need not consider. *Judgment on the verdict.*

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HENRY LEE & another, trustees, *vs.* CHARLES A. WELCH & another, executors.

Suffolk. December 7, 1894. — March 4, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Devise and Legacy — Contingency — Survivorship — Gift to "my other Children."

A testator, having provided for his wife by will, directed that during her life the balance of the net income of the residue should be equally divided among his children, and after the wife's decease all his estate should "be divided into as many equal parts as the number of my children who survive her shall be (the issue of a deceased child always standing *in loco parentis*) and the shares" of the sons to be theirs absolutely. The shares of the daughters were to be held in trust during their respective lives, so as to secure to them the income of their respective shares during life, "and to their respective husbands, if they shall leave their present ones surviving them, the income and produce during the lives of these husbands respectively; and from and after the decease of my daughters and their husbands respectively the trust premises shall go to their respective issue, if any shall then be living; otherwise, the said trust premises shall go to my other children or their issue respectively." The testator left surviving him a widow and five children, A., B., C., D., and E., all of whom survived the widow. D., a daughter, died on December 9, 1885, childless, leaving a husband, who was her husband at the date of the will and who died on May 4, 1894. E. still lived. C. died unmarried before D., on January 18, 1877, leaving a will. A. and B. died after D. and before D.'s husband, testate, and leaving children. *Held*, that one third of D.'s share went to E., one third to the issue of A., and one third to the issue of B., as purchasers.

HOLMES, J. This is a bill brought by the trustees under the will of William D. Sohier, for the construction of the last words of the following clause of the will: "During the life of my wife the balance of the net income of all the residue of my estate, real and personal, shall be equally divided and paid to and among my children, and after her decease all my estate shall be divided into as many equal parts as the number of my children who survive her shall be (the issue of a deceased child always standing *in loco parentis*) and the shares of my sons may be taken by them and be at their absolute disposal. The shares of my daughters shall be conveyed and assigned to two or more persons in trust, so and in such manner as to secure to their sole and separate use, during their respective lives, the income and annual produce of

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their respective shares, and to their respective husbands, if they shall leave their present ones surviving them, the income and produce during the lives of these husbands respectively; and from and after the decease of my daughters and their husbands respectively the trust premises shall go to their respective issue, if any shall then be living; otherwise, the said trust premises shall go to my other children or their issue respectively." The testator previously had provided for his wife, and this is the final disposition of the residue.

The testator left surviving him a widow, and five children all of whom survived the widow. One of these children, Mary D. S. Higginson, died on December 9, 1885, childless, leaving surviving her her husband, Waldo Higginson, who was her husband at the date of the will, and who died on May 4, 1894. The question is to whom her share shall go. One child, Elizabeth B. Bryant, still lives. Another child, George B. Sohier, died unmarried before Mrs. Higginson, on January 18, 1877, leaving a will. The other two, Edward D. Sohier and William Sohier, died after Mrs. Higginson and before Mr. Higginson, testate, and leaving children. If interests in Mrs. Higginson's share vested in her brothers at the death of the testator or of his widow, they passed by their wills. It is not necessary to state all other possible constructions.

The gift to issue in the words to be construed, "shall go to my other children or their issue," clearly is by way of substitution. *O'Rourke* v. *Beard*, 151 Mass. 9. For this reason, if for no other, the children of Edward and William take as purchasers the shares that their father would have taken if living. But we are of opinion further, that this gift to "my other children" is only to such children as survive Mr. and Mrs. Higginson. The foundation of the gift is contingent. The estate is to be divided only among such children as survive the testator's widow. According to the beginning of the paragraph, as set forth above, the right of a child in the lifetime of the widow was none the less contingent that there was in that case also a substituted devise to issue. The general principle throughout is survivorship. Just before the words in question, it is directed that "the trust premises shall go to their respective issue, if any shall then be living." "My other children" cannot mean all my other children, as it

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would be absurd to suppose that a larger class took the secondary shares than took the original shares. Inasmuch as the testator excludes children who have not survived his widow, and as children who have survived her, but have died before the moment of distribution leaving issue, take nothing, it seems to us more in accordance with the implications of the will to say that the final gift also is contingent on survivorship, rather than to say that it is vested in the artificially selected class of children who survive the widow, but subject to be devested in favor of their issue, if they leave any, and that it gives to those who have no children the preference of absolute ownership. We have to go upon slight differences. If the limitation after the widow's death were to all the children, it may be that all the children would take the remainder in Mrs. Higginson's share, only subject to be devested in favor of their issue in case they died before the moment of distribution. But that is not this case.

The result is, that Mrs. Higginson's share will go, one third to Mrs. Bryant, one third to the issue of Edward D. Sohier, and one third to the issue of William, as purchasers.

Decree accordingly.

F. V. Balch, for the petitioners, read the papers in the case.

W. G. Russell & J. Fox, for the children of Edward D. Sohier.

J. Lowell, for the children of William Sohier.

C. A. Welch, for the trustees under the wills of Edward D. Sohier and William Sohier, and for William D. Sohier, executor, submitted the case on a brief.

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FORREST E. WILSON *vs.* STEEL EDGE STAMPING AND RETINNING COMPANY.

Suffolk. November 22, 23, 1894. — March 6, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Dangerous Machine — Breach of Duty to give Warning or Instruction — Contributory Negligence — Action.

A., who was nearly twenty-one years old, and who two years previously had been employed in a factory for several weeks, working some of the time with a circular saw, applied at B.'s factory for work. B.'s superintendent took him to a workman, and asked the latter if he had any work for A. to do. The man took A. to a circular saw, and asked him if he had ever run a saw; and A. replied that he had a very little, but was not an experienced hand. The man then set the gauge and ran through two or three sticks, and then told A. to go to work. A. did so, and the man watched him run through two or three sticks and then went away, giving no instructions to A., who asked for none, and who informed no one that he was in need of instructions. He continued to work upon the saw for ten days, when he was injured. *Held*, in an action by him against B. for his injury, that at the time when the accident occurred he was not so young and inexperienced that it was a breach of duty on B.'s part not to give him warning or instruction.

A workman who feeds a circular saw by means of his hand, knowing a safer practicable method, is not in the exercise of due care.

TORT, for personal injuries occasioned to the plaintiff, while operating a circular saw in the defendant's employ, by the alleged negligence of the defendant. Trial in the Superior Court, before *Dunbar*, J., who, at the defendant's request, directed the jury to return a verdict for the defendant, and reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise, a new trial was to be granted. The facts appear in the opinion.

D. E. Ware, for the plaintiff.

A. Hemenway & G. Cunningham, for the defendant.

BARKER, J. While at its best estate the circular saw is one of the most dangerous machines in common use, there was in the present case evidence from which the jury might have found that there were bull's-eyes in this saw, that its arbor had been out of true, that holes and depressions had developed in the saw-table, and that the gauge in use was in poor condition, and

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liable to work loose. If the plaintiff had met with an accident due to any of these causes, and to which his own carelessness did not contribute, it might have been a question for the jury whether the defendant had used that care which the law required of him to provide and keep reasonably safe machinery and appliances for the use of his workmen, although it is to be remarked that the alleged defects were pretty obvious, and that there seems to have been no change in the condition of things after the plaintiff entered the defendant's employment. We do not think that at the time when the accident occurred he was so young and inexperienced that it was a breach of duty on the part of the defendant not to give him warning or instruction.

He was almost twenty-one years of age, having been born in Maine, and lived there until fourteen, when he removed to Massachusetts. He lived with his father, who after his removal to this State was in charge as superintendent of the town farm of Wrentham. He attended school in Maine and Massachusetts until sixteen years of age. Up to the time when he was eighteen his only work had been farming and driving team, but the winter he was eighteen he worked six weeks in a wooden-box factory, some of the time working with a matcher and double cut-off circular saw, and the next winter he worked four months in the same factory. How he was employed during the winter of 1892 does not appear. On August 2, 1892, when twenty years and ten and a half months old, he went to the defendant's factory and applied to the superintendent for work. He was asked if he had ever run a circular saw, and answered that he had a very little, but was not an experienced hand. It was arranged that he should begin work the next day but one. He was then put to work planing with a planing machine, being first asked if he had ever done any planing, and answering that he had not, but that he had taken away the planed stuff as it came from the machine. The man who asked the question then set the gauge of the plane, ran through one or two pieces, got a boy to take away the stuff as it was planed, and left the plaintiff to work there all day. He seems to have asked no instructions as to planing, and to have needed none. In the factory, which was about one hundred and fifty feet long by fifty feet wide, were planers, saws, turning lathes, and boring machines. The next

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morning the superintendent took him to a man who was filing saws at one end of the factory, and asked the man if he had any work for the plaintiff to do. The man took the plaintiff to a circular saw some fifteen feet away, and asked the plaintiff if he had ever run a saw. The plaintiff answered that he had a very little, but was not an experienced hand. The man then set the gauge and ran through one or two sticks, and then told the plaintiff to go to work. He did so, and the man watched him run through one or two sticks, and then went away, giving the plaintiff no oral instructions and the plaintiff asking for none, and not informing any one that he was in need of instructions. This was upon August 5, and he continued to work upon the saw until August 15, when he was hurt. This statement does not show that the plaintiff was in need of instruction or warning when he began to work upon the defendant's saw, and the defendant, in the absence of any direct request on the plaintiff's part, was justified in putting him to work without other showing than that which was given.

While the plaintiff was using the saw, before the time when his hand was hurt, he had ample opportunity to learn the dangers to which that particular saw exposed him in its use. The gauge loosened and got out of place and caused the wood to bind; the saw heated, burned the wood, and stopped. Pieces of lumber which he was sawing had been made by the saw to fly up and fly back, and to fly back with great force. The work he was doing was the cutting of pieces of plank, some eighteen inches in length and some six inches wide, into thin slats or cleats. In doing this he stood at the side of the table toward which the saw revolved, and fed the pieces of the saw. Opposite him stood another workman, who took away the thin slat or cleat, and returned to him the rest of the piece to be again passed through the saw.

The saw-bench was equipped with a feed roll, which pushed the wood along until its rear end was within about four inches of the saw. Then the feed roll was no longer in contact with it, and the method of propelling the wood through was to follow it with another of the pieces to be sawn. The plaintiff had sawed all the pieces but one, and so had no other like piece with which to follow the one on which he was at work after it

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left the feed. The usual and safe method in that case is to follow the piece which is being sawed with some other piece of wood, thus pushing it forward. The plaintiff knew this method, and had used it. The final piece which he was sawing was about six inches wide, and, instead of pushing it forward with some other stick, he pushed it with his hand. His hand was on the outer edge of the piece of plank pushing it through the saw, when the piece jumped up and threw his hand on to the saw. It is apparent that the extreme rear end of the wood was within four or five inches of the teeth of the saw, and that the plaintiff's hand must have been still nearer and pushing towards them.

This was an extremely dangerous thing to do. The plaintiff not only knew the dangers ordinarily incident to the use of a circular saw, but he knew that this particular saw would bind and heat, and that its gauge would work loose, and that it would make the wood it was sawing fly up and fly back with force. For him with this knowledge to risk his hand by placing it on the outer edge of the rear end of the stick, and attempting with his hand to hold the stick and to push it forward through the saw, was that disregard without adequate reason of great and obvious danger which the law holds to be negligence. The accident occurred so quickly that he cannot tell just how the stick was thrown. But even if it was thrown somewhat differently from those sticks which he had repeatedly seen fly up and fly back, the danger that a hand pressing against the saw a stick which was liable to be thrown would be carried against the saw if the wood should fly, is so obvious, that the plaintiff must be charged with knowledge of it. *Richstain* v. *Washington Mills*, 157 Mass. 538, 541, and cases cited. *Downey* v. *Sawyer*, 157 Mass. 418. *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554. *Connolly* v. *Eldredge*, 160 Mass. 566. *Watts* v. *Boston Tow-Boat Co.* 161 Mass. 378.

Judgment on the verdict.

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CITY OF NEWTON *vs.* OLIVER H. PERRY & another.

Norfolk. December 4, 5, 1894. — March 6, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Taking by City of Land for Protection of Water Supply — Right to Exclusive Possession of Surface.

When land is taken by a city under statutory authority for the protection of its water supply, such taking carries the right to exclusive possession of the surface.

BILL IN EQUITY, filed April 18, 1894, for the protection of the plaintiff's water supply. Hearing before *Allen*, J., who reported the case for the consideration of the full court, in substance as follows.

The premises in question are situated in Needham, on the bank of the Charles River, and were taken by the plaintiff on or about December 17, 1889, under and by virtue of the power given to it by Sts. 1872, c. 344; 1873, c. 326; 1876, c. 54; and 1889, c. 302. The rights in the premises were duly taken by the plaintiff under said statutes, except that the extent of the title gained by the plaintiff is questioned by the defendants. The defendant Perry, being the owner of the premises, took proceedings for recovering damages for the taking, and such damages were awarded for the value of the land and buildings thereon, and the amount thereof paid. It appeared that the defendants were keeping upon the premises several hundred pigs, besides other animals, and there was evidence as to the condition of the piggery and the danger arising therefrom.

It was agreed that the plaintiff had only voted to take 1,500,000 gallons of water a day, and that the end of the conduit already built at the time of the trial (May 11, 1894,) was 2,600 feet from the piggery. The plaintiff was preparing, however, to lay an extension of the conduit through the land of Perry. An order appropriating money for such extension was passed May 9, 1894, and pipe had been bought and work begun in anticipation of the passing of such order, with the intention of extending the conduit through said premises.

The plaintiff had requested and notified the defendants to

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remove the sources of pollution to the water caused by the keeping of swine and other animals, and to do no act which would render the water supply impure; but the defendants refused to comply with such request, and continued to commit the acts complained of.

A witness for the plaintiff testified that the plaintiff was obtaining its water by means of an underground conduit, which collected the water by percolation from the soil above, below, and on the sides thereof; and that the conduit already built was from six to ten feet below the level of the river.

It also appeared that in 1893 the average use of water by the plaintiff from the conduit was 1,369,000 gallons a day; and that in some months, including water stored in the reservoir, over 1,500,000 gallons were used. There was no evidence that the amount taken from Charles River had ever exceeded 1,500,000 gallons a day. It appeared that, from the present conduit, the plaintiff could get 1,500,000 gallons a day by pumping twenty-four hours with the present pumping appliances.

The defendants contended that the present water supply of the plaintiff was not injured by the defendants' occupation of the premises; that under St. 1889, c. 302, the plaintiff could take only such an amount of water as it had voted to take, and it had only voted to take 1,500,000 gallons a day; that all the plaintiff could take from the defendant Perry was an easement in the land, and it was for the loss by this easement that his petition for damages was brought; that the defendants were entitled to make any use of the land not inconsistent with the plaintiff's requirements; that no conduit had been built on the premises, and none could be until some further action by the plaintiff; and that the conduit, when built, would be higher than the place where the piggery was.

A decree was entered, perpetually enjoining the defendants from using and occupying the premises in question, from depositing polluting matters thereon, from polluting the plaintiff's water supply, and from permitting swine and other animals to remain upon the premises; and ordering the defendants to remove their swine and other animals and all polluting matters from the premises; and that the plaintiff have possession of the premises. From which decree the defendants appealed to the full court.

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E. P. Carver & E. E. Blodgett, for the defendants.

W. S. Slocum, for the plaintiff.

HOLMES, J. There are no sacramental words which must be used in a statutory power to take and hold lands in order to give a right to take the lands in fee. Any language in the statute which makes its meaning clear is sufficient, and a very little more than "take and hold" has been held enough. *Dingley* v. *Boston*, 100 Mass. 544. *Page* v. *O'Toole*, 144 Mass. 303. In *Titus* v. *Boston*, 161 Mass. 209, "take in fee" was thought to mean take the lands, and not merely an easement. We assume, in deference to the decisions, that the power to take and hold given by the statutes in this case only authorized the taking of an easement. *Harback* v. *Boston*, 10 Cush. 295. *Attorney General* v. *Jamaica Pond Aqueduct*, 133 Mass. 361, 365. *Conklin* v. *Old Colony Railroad*, 154 Mass. 155. But it is plain from these, as from all the cases, that the purpose of the taking must fix the extent of the right. The right, whether it be called easement or by any other name, is statutory, and must be construed to be large enough to accomplish all that it is taken to do.

One of the purposes for which the defendants' land was taken was for the protection of the plaintiff's water supply. St. 1889, c. 302, § 3. It is too late for the defendants to deny that it was necessary to take the land for that purpose. It has been taken, and they have been paid for it. Whatever rights over the land could be needed for the protection of the water under any circumstances the plaintiff has got; and whatever rights it has, it may exercise at once. It would be an unjust refinement to say that the right is only to do such things from time to time as a court or jury may think necessary then. The whole right is paid for without regard to the probability of its being exercised. *Howe* v. *Weymouth*, 148 Mass. 605. *Proprietors of Mills* v. *Randolph*, 157 Mass. 345, 353. We are of opinion that, when land is taken for the protection of a water supply, exclusive possession of the surface is or may be necessary in order to get the protection needed, and therefore that the right to such possession is one of the rights taken. See *Brainard* v. *Clapp*, 10 Cush. 6; *Cassidy* v. *Old Colony Railroad*, 141 Mass. 174, 177.

Decree affirmed.

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MARY E. SCHAYER *vs.* COMMONWEALTH LOAN COMPANY.
SAME *vs.* SAME.

Suffolk. December 11, 1894. — March 6, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Replevin — Mortgage of Personal Property — Tender — Discharge of Lien — Assault and Battery — Action.

If an agent of the mortgagor of personal property goes to the mortgagee's place of business for the purpose of paying to him the sum necessary to discharge the debt under St. 1888, c. 388, having with him sufficient money for that purpose, and being ready and willing to pay the same, and makes known his purpose and his readiness and willingness so to pay to the mortgagee, and is prevented from making an actual and formal tender of the proper sum only by the mortgagee's refusal to accept it and his assertion that a larger amount is due, and his withdrawal from further talk and from the immediate presence of the agent for the purpose of preventing the making of the tender, the acts of the agent are equivalent to a tender, and have the effect to discharge the lien of the mortgage.

If acts of an agent of a mortgagor of personal property have the effect, under St. 1888, c. 388, to discharge the lien of the mortgage, the mortgagor may maintain an action against the mortgagee for an assault and battery committed by his servants in subsequently taking the property by force from the possession of the mortgagor.

TWO ACTIONS, the first being replevin of certain personal property, which had been mortgaged by the plaintiff to the defendant, who was Frank E. Chaffee, doing business under the name of the Commonwealth Loan Company; and the second being tort for an assault and battery alleged to have been committed upon the plaintiff by the servants of the defendant when forcibly removing the property from the plaintiff's premises. The cases were tried together in the Superior Court, before *Bond*, J.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions. The facts appear in the opinion.

E. R. Anderson, for the defendant.

J. R. Murphy, (*R. S. Hall* with him,) for the plaintiff.

BARKER, J. The debt due from the plaintiff to the defendant Chaffee, who seems to have done business under the name of

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the Commonwealth Loan Company, being a loan made since May 22, 1888, upon interest at a rate equivalent to eighty per cent a year, was by force of St. 1888, c. 388, "dischargeable by the debtor upon payment or tender of the principal sum actually borrowed and interest at the rate of eighteen per centum per annum, from the time said money was borrowed, together with a sum for the actual expenses of making the loan and securing the same, not exceeding ten dollars." The goods replevied by the plaintiff had been mortgaged by her to the defendant as security for the payment of her debt, and were in his possession after breach of condition, and the action of replevin cannot be sustained unless the lien of the mortgage given to secure the payment of her debt has been discharged under the operation of the statute. She has neither paid the debt nor made a complete and formal tender of the amount due; and the question for decision in the replevin suit is whether there was evidence upon which the jury might find that the plaintiff in attempting to pay her debt has done acts which are equivalent to a tender or payment, an actual tender or payment having been waived or prevented by the defendant. If the plaintiff thus stands in the position of a mortgagor who has tendered payment of the mortgage debt, the lien of the mortgage is discharged. *Weeks* v. *Baker*, 152 Mass. 20. See also *Patch* v. *Collins*, 158 Mass. 468; *Douglas* v. *Stetson*, 159 Mass. 428.

The evidence would have justified a finding that an agent of the plaintiff went to the defendant's place of business for the purpose of paying to him the sum necessary to discharge the debt under the statute, having with him sufficient money for that purpose, and being ready and willing to pay the same, and made known his purpose and his readiness and willingness so to pay to the defendant, and was prevented from making an actual and formal tender of the proper sum only by the defendant's refusal to accept it and his assertion that a larger amount was due, and his withdrawal from further talk and from the immediate presence of the agent for the purpose of preventing the making of the tender. This had the effect to discharge the lien of the mortgage, for the acts of the plaintiff's agent were in law equivalent to a tender. *Gilmore* v. *Holt*, 4 Pick. 258. *Breed* v. *Hurd*, 6 Pick. 356. *Southworth* v. *Smith*, 7 Cush. 391.

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Parker v. *Perkins*, 8 Cush. 318. *Hazard* v. *Loring*, 10 Cush. 267. The maxim that the law does not compel one to do vain or useless things applies to the circumstances of the attempted payment, with the result that the plaintiff must be deemed to be in the same position as if payment had been made or if the required amount had been actually tendered. Further illustrations of the principle are found in the cases where deeds would have been tendered but for the evasion of the other party as in *Borden* v. *Borden*, 5 Mass. 67, and *Tasker* v. *Bartlett*, 5 Cush. 359; and where goods are retained by a carrier to enforce the payment not only of freight, but of an additional unlawful charge, as in *Adams* v. *Clark*, 9 Cush. 215, and *Peebles* v. *Boston & Albany Railroad*, 112 Mass. 498, 509; or where concurrent acts are to be done by parties one of whom is willing and ready to perform, and has given notice to that effect, while the other has refused to perform or has put performance out of his power, as in *Cook* v. *Doggett*, 2 Allen, 439, *Linton* v. *Allen*, 154 Mass. 432, 439, and *Wheatland* v. *Silsbee*, 159 Mass. 177, 185. This view of the law makes it unnecessary to consider in detail the rulings asked for the defendant in the replevin suit. Whether, if the acts of the plaintiff's agent in attempting to pay her debt were equivalent to a tender, the plaintiff may have lost the benefit of the tender by failing to keep the defendant's money separate, or to pay it into court, is a question not raised. We are of opinion that the question whether the plaintiff's lien had been discharged was for the jury upon the evidence, and we see no error in the instructions of the court upon this branch of the cases, nor in the refusal of rulings requested by the defendant.

After the attempt which has been considered to pay the plaintiff's debt, the defendant gave notice that he should take possession of the property covered by the mortgage for the purpose of foreclosing the equity of redemption, and also that he elected to become the absolute owner of the property, accepting it in satisfaction of the debt. Thereafter he took it by force, committing acts which, if not justified by his rights in the property and under the mortgage, constituted an assault and battery, and which were the wrongs alleged in the action of tort. It is not necessary to inquire whether all the rulings of the court upon this branch of the case were correct. The finding of the jury,

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that the defendant had no right under the mortgage at the time he took the property from the plaintiff's rooms by force, makes the defendant's requests for rulings as to his right to use force to take the property, and his exceptions to the instructions given upon that subject, immaterial.

Exceptions in both cases overruled.

EDWARD B. O'BRIEN *vs.* FRANK E. BAILEY & others.

Middlesex. December 14, 1894. — March 9, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Partition — Mortgagee in Possession.

A petition for partition of land will not lie if the mortgagee thereof has entered for condition broken, and is in actual possession of the premises at the time of the filing of the petition.

PETITION to the Probate Court, for partition of land in Somerville. The judge decreed that a partition be made by a sale and conveyance, and the respondent Bailey alone appealed to this court, assigning, among other reasons for appeal, that the "holder of certain mortgages which have priority to the claim of all the cotenants thereof, and to the claims of all the persons named in said petition, has entered and holds possession of said land for breach of conditions of said mortgages." Trial before *Holmes*, J., who reserved the case for the determination of the full court.

W. B. Durant, for the petitioner.

L. R. Wentworth, for the respondent Bailey.

R. J. McKelleget, for certain cotenants, joined in the brief of the petitioner.

HOLMES, J. The land of which partition is sought is subject to a mortgage which is paramount to the interests of the parties to this suit. The mortgagee has entered for condition broken, and now is in actual possession of the premises. The parties therefore have not such an estate in possession as

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is required by Pub. Sts. c. 178, § 8, and they are not within the exception as to leases made by § 68 in accord with Co. Lit. 167 *a*, changing the law as laid down in *Hunnewell* v. *Taylor*, 6 Cush. 472. They have not the "present unconditional and unqualified right of entry" (*Marshall* v. *Crehore*, 13 Met. 462, 466) which is the least that has been held sufficient to warrant these proceedings. The petitioner seeks to press a few words let fall by Shaw, C. J., in *Ewer* v. *Hobbs*, 5 Met. 1, 7, further than they go, and further than we can suppose them to have been meant to go. It is true that the mortgagees in possession may be made to account for the rents and profits in case of redemption, but their entry is adverse, and their possession while it lasts is on their own behalf. See *Shepard* v. *Richardson*, 145 Mass. 32, 37. It is clear that, when a third person is in exclusive possession under an adverse lien for a debt which must be satisfied before the parties can enter upon the land, partition cannot be had. *Hurley* v. *Hurley*, 148 Mass. 444. *Blodgett* v. *Hildreth*, 8 Allen, 186. *Bradley* v. *Fuller*, 23 Pick. 1, 8. *Taylor* v. *Blake*, 109 Mass. 513, 519. The objection does not depend upon the mortgagee's being a party to the proceedings, but goes to the jurisdiction of the court under the statute when the fact is pleaded. It is unnecessary to consider whether this case can be distinguished from *Hurley* v. *Hurley*, with regard to the lien of the respondent Bailey for taxes paid by him. In view of our decision, it also is unnecessary to consider the objection that the petitioner appears for some of the respondents as guardian.

Petition dismissed.

FANNY E. EMERY *vs.* HORACE H. BURBANK, executor.

Middlesex. January 8, 9, 1895. — March 9, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Oral Agreement to make Will — Statute — Foreign Law.

An action was brought on an oral agreement, alleged to have been made in Maine, in 1890, by A., the defendant's testator, to the effect that, if the plaintiff would leave Maine and take care of A., the latter would leave the plaintiff all his

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property at his death and would also put four thousand dollars into a house which the plaintiff should have; and evidence was introduced at the trial tending to prove the agreement as alleged. *Held*, that St. 1888, c. 372, which provides that an agreement to make a will or give a legacy or devise by will shall not be binding unless in writing, was a bar to the action, and that the fact that the plaintiff had furnished the stipulated consideration did not prevent the application of the statute.

HOLMES, J. This is an action on an oral agreement, alleged to have been made in Maine in 1890, by the defendant's testatrix, Mrs. Rumery, to the effect that, if the plaintiff would leave Maine and take care of Mrs. Rumery, the latter would leave the plaintiff all her property at her death, and also would put four thousand dollars into a house which the plaintiff should have. At the trial evidence was introduced tending to prove the agreement as alleged. The presiding justice ruled that the action could not be maintained, and the case is here on exceptions. As we are of opinion that the ruling must be sustained under St. 1888, c. 372, requiring agreements to make wills to be in writing, a fuller statement of the facts is not needful.

There is no doubt of the general principles to be applied. A contract valid where it is made is valid everywhere, but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum. *Van Reimsdyk* v. *Kane*, 1 Gall. 371, 375. *Greenwood* v. *Curtis*, 6 Mass. 358. *Fant* v. *Miller*, 17 Grat. 47, 62. Or again, if the law of the forum requires a certain mode of proof, the contract, although valid, cannot be enforced in that jurisdiction without the proof required there. This is as true between the States of this Union as it is between Massachusetts and England. *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304, 306. *Pritchard* v. *Norton*, 106 U. S. 124, 134. *Downer* v. *Chesebrough*, 36 Conn. 39. *Kleeman* v. *Collins*, 9 Bush, (Ky.) 460. *Fant* v. *Miller*, 17 Grat. 47. *Hunt* v. *Jones*, 12 R. I. 265, 266. *Yates* v. *Thomson*, 3 Cl. & Fin. 544, 586, 587. *Bain* v. *Whitehaven & Furness Junction Railway*, 3 H. L. Cas. 1, 19. *Leroux* v. *Brown*, 12 C. B. 801. When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements, or legality, of the contract on the one hand, or to the evidence by which it shall be proved on the other. In the former case the law affects contracts made within the jurisdiction, wherever sued, and may

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affect only them. *Drew* v. *Smith*, 59 Maine, 393. In the latter, it applies to all suits within the jurisdiction, wherever the contracts sued upon were made, and again may have no other effect. It is possible, however, that a statute should affect both validity and remedy by express words, and this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. For instance, in a well known English case Maule, J. said, "The fourth section of the statute of frauds entirely applies to procedure." And on this ground it was held that an action could not be maintained upon an oral contract made in France. But he went on "It may be that the words used, operating on contracts made in England, renders them void." *Leroux* v. *Brown*, 12 C. B. 801, 805, 827. We cite the language, not for its particular application, but as a recognition of the possibility which we assert.

The words of the statute before us seem in the first place, and most plainly, to deal with the validity and form of the contract. "No agreement . . . shall be binding, unless such agreement is in writing." If taken literally, they are not satisfied by a written memorandum of the contract; the contract itself must be made in writing. They are limited, too, to agreements made after the passage of the act, a limitation which perhaps would be more likely to be inserted in a law concerning the form of a contract than in one which only changed a rule of evidence. But we are of opinion that the statute ought not to be limited to its operation on the form of contracts made in this State. The generality of the words alone, "no agreement," is not conclusive. But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practised without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicil of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence, wherever they are made.

If we are right in our understanding of the policy established by the Legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles.

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"If oral evidence were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to override any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favor of any stringent domestic policy which controls all maxims of private international law." Westlake, Priv. Int. Law, (3d ed.) § 208. Wharton, Confl. Laws, (2d ed.) § 766.

In our view, the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case. It is not necessary to decide exactly how broad the rule may be, — whether, for instance, if, by some unusual chance, a suit should happen to be brought here against an ancillary administrator upon a contract made in another State by one of its inhabitants, the contract would have to be in writing. The rule extends at least to contracts by Massachusetts testators. It might be possible to treat the words, "signed by the party whose executor or administrator is sought to be charged," as meaning "signed by the party whose executor or administrator is sought to be charged in Massachusetts," and to construe the whole statute as directed only to procedure. Compare *Fant* v. *Miller*, 17 Grat. 47, 72 *et seq.* *Denny* v. *Williams*, 5 Allen, 1, 3, 9. Upon this question also we express no opinion. All that we decide is that the statute does apply to a case like the present.

The law of the testator's domicil is the law of the will. A contract to make a will means an effectual will, and therefore a will good by the law of the domicil. In a sense, the place of performance, as well as the forum for a suit in case of breach, is the domicil. We do not draw the conclusion that therefore the validity of all such contracts, wherever sued on, must depend on the law of the domicil. That would leave many such contracts in a state of indeterminate validity until the testator's death, as he may change his domicil so long as he can travel. But the consideration shows that the final domicil is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a State to declare, upon the same considerations which dictate a rule of evidence, that a contract

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must have certain form if it is to be enforced against its inhabitants in its courts. Legislation of this kind for contracts which thus necessarily reach into the jurisdiction in their operation hardly goes as far as statutes dealing with substantive liability which have been upheld. *Commonwealth* v. *Macloon*, 101 Mass. 1.

If the statute applies, the fact that the plaintiff has furnished the stipulated consideration will not prevent its application.

Exceptions overruled.

E. Greenhood, for the plaintiff.

A. Hemenway, (*H. C. Mulliyan* with him,) for the defendant.

LEONARD C. SPROW, administrator, *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Middlesex. November 15, 16, 1894. — March 13, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Loss of Life — Railroad — Public Way by Prescription — Adverse Use — Acquiescence in such Use — Due Diligence.

In an action against a railroad corporation for causing the death of a person at a crossing over its railroad, in order to show that the crossing has become a public way by prescription it is necessary for the plaintiff to prove an adverse use continued without interruption for twenty years, and an acquiescence in such use by the defendant.

The fact that there is a private way across a railroad by reservation does not prevent the public from gaining a right to use the way by prescription.

From merely using what is open to use, without more, no presumption arises that the use is adverse.

In determining whether the unauthorized use of a private way is under a claim of right, the final test is, not whether it is greater or less in amount than the rightful private use, but whether it is of such a character as to show the assertion or assumption of a right so to use the way, or a use under the belief that such use is a matter of public right.

The mere posting up of a sign, "Private way," by a railroad corporation, at the crossing of its railroad by a way, is not to be deemed a prohibition of passage by others than those entitled as of right to pass along the way.

In determining whether there was such acquiescence in the use of a way as is necessary in order to establish a public right, mere permission is not enough, but there must be something to show that such permission was accompanied

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with knowledge or reason to believe that the way was used under a claim of a public right.

A way across a railroad was reserved in the original deed of the premises to the railroad corporation, given in 1884 by J., who owned a large tract of land on the south side of the railroad. The way was never laid out as a public way, but it led from a highway on the north of the railroad to J.'s land on the south; and the land has since been used for buildings, twenty or thirty houses having been erected upon it, and in 1868 the name of G. Avenue was given to the way, the use of which had much increased, from one hundred to one hundred and fifty persons passing over it daily. It had never been repaired by the city, or treated by it as a public way, on either side of the railroad. Southerly of the railroad there was a steep ascent, which was not kept in such repair as would be expected if it were a charge upon the city. The way on that side passed through an opening less than fourteen feet wide in the fence on the side of the railroad. The general use of the avenue was mainly for the houses situated upon it, but incidentally it was also used by persons going through the avenue to reach some point beyond. Anybody used it who wished so to do, and with teams and vehicles of various descriptions. At the crossing the railroad corporation had put up within its premises a sign, "Dangerous passing. This is a private way." On the outside of the fence the city had also put up a sign, "Not a public way. Dangerous." There was no sign-board such as is required by statute where a public way and a railroad cross each other on a level. *Held*, in an action against the railroad corporation for causing the death of a person at the crossing, that the evidence was not sufficient to warrant a finding that the crossing had become a public way by prescription.

A young woman, possessing good eyesight and hearing, who had lived for several months in a house about fifty feet distant from the tracks of a railroad, was accustomed to cross over them frequently by a private way, which was used quite generally by the public, and which passed through an opening in the fence at the side of the railroad. An approaching train could not be seen until this opening had been reached, and then could be seen a long distance. She left her house about the time when an express train was due at the crossing, on a stormy day, and hurried along the way, intending to take an electric car which was about to start from a station on the opposite side of the tracks. She passed through the opening in the fence and entered upon the tracks, having her umbrella raised, and, walking rapidly, and without looking to see if a train was coming, attempted to cross the tracks, when she was struck by the locomotive engine of the express train and killed. *Held*, in an action against the railroad corporation for causing her death, that the evidence showed that she was not in the exercise of due diligence.

TORT, by the administrator of the estate of Ellen Harrod, for causing her death. The declaration contained two counts, one under Pub. Sts. c. 112, § 213, and the other under § 212. Trial in the Superior Court, before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

It appeared that the plaintiff's intestate, who was a colored woman, was killed on June 9, 1892, by being struck by the locomotive engine of an express train of the defendant at a

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crossing at grade of a way known as Greenwood Avenue by the defendant's railroad in Newton.

Edward A. Moore testified that he was a motorman upon an electric railway which passed by the crossing in question; that just before the accident he was in the lobby in one corner of the car station waiting to act as motorman on a car which was due to leave there at 12.15 P. M.; that he started the car, and the defendant's train was then near Brookside Avenue, which was the next crossing to the east; that before he got on his car he saw a colored woman on the opposite side of the railroad track approaching the crossing at a fast walk; that the locomotive engine passed him just as he was taking the point of the switch at the siding; that he heard the bell ringing and the noise of the train, and knew the train was coming, as far back as Brookside Avenue, but the bell was not ringing as the engine passed him; that the woman appeared to be hurrying at a fast walk when he first saw her, ten or fifteen feet back from the fence at the side of the railroad; that she came through the fence a very little way when he took his eyes off her; that this was before the train cut off his view; and that she hesitated a little as she got through the fence, as if looking before she got to the tracks.

Gillespie Lawson testified that at the time of the accident he was sitting in the doorway of his house, and saw the woman go upon the avenue; that she walked as fast as she could down the avenue, with her umbrella up, as it was raining; that she went upon the railroad, and before she got across — she was going very fast — she stopped all of a sudden, looked west, then east, and as soon as she looked east made a jump, and was hit by the train; that he heard no bell or whistle, and had no idea there was a train about until he saw it; that it was going fast; that the wind and rain drove from the west, and she held her umbrella toward the west; that she did not stop as soon as she got inside the fence, or as soon as she got to the nearest track, but had passed the nearest track before she stopped; that she did not look before she stopped, and he thought she was about at the second track when she stopped; that he said, when he saw it, "how foolish she was to go before the train, and it was nigh"; and that he did not think she stopped to look, but that she

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had got so far when she discovered the train that she was close on to the track.

Hannah A. Dunn testified that she had lived on Greenwood Avenue five years; that she lived in the house in which Ellen Harrod was stopping, right opposite the crossing, and had noticed people using Greenwood Avenue ever since she had been there; that it had been used by ice teams, milk teams, grocery wagons, and builders; that she had seen wagons from Boston with furniture moving out there, and a hundred or a hundred and fifty persons pass there every day; that Harrod could not have seen the train as she came down the avenue from her house until she had passed through the entrance in the fence on the southerly line of the railroad; that Harrod had been stopping in that house from September, 1891, to the time of her death; that she was in general employment, or working by the day, during the time she was there, and took her noon meal away from home; that she said she was twenty-three years old; that she was active and strong, and did washing, ironing, and cooking; and that she, the witness, did not see the accident.

On cross-examination, she testified that the deceased used the electric cars, and had to pass this crossing to get to them; that she had seen her crossing when a train was pretty near before; that, when standing by the fence, one could see as far as the railroad was straight; and that the deceased possessed good eyesight and hearing.

Nellie M. Sprow testified that she was the wife of the plaintiff; that Ellen Harrod was living with the witness in a house on Greenwood Avenue, and had lived there since the fall of 1891; that on the day of the accident she saw Harrod leave the house, and turn down the avenue; that she was taller than Harrod was, and in going down the avenue could not see a train coming from Boston before she got on to the railroad; that it was a cloudy day, and raining when Harrod went out; that Harrod had an umbrella raised; and that the electric car was due at the crossing at a quarter past twelve.

On cross-examination, she testified that she only saw Harrod go out of her door; that she went to the door with her; that it was just a quarter past twelve, and the electric car was coming; that Harrod saw the electric car from the house, and started to

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run out of the house; that the electric car was then about opposite the car-house; that the witness would have reason to expect a train whenever she went to the crossing, and always looked; that Harrod rushed to get an umbrella, raised it, and the witness did not see her any more; and that it was quite a steep hill down to the railroad.

Abbie E. Davis testified that she was the wife of Charles D. Davis, and had lived eight years on Greenwood Avenue; that "the road was used by everything that any one wished to come up the street, hacks, ice teams, coal teams, and other teams"; that the city's snow-plough always came up there to make a path; and that it was a way to Newton Centre, and had been in constant use ever since she had been there.

Charles D. Davis testified that he had lived on Greenwood Avenue for eight years, and during that time the crossing had been constantly used by every one who had occasion to go on to the hill, and for the general purposes of a street.

On cross-examination, he testified that the general use of Greenwood Avenue was mainly for the houses that were upon the avenue itself, and for those persons who come to bring supplies to those houses, and incidentally it was used from time to time by persons who are going through to reach some other point beyond; that the city had not laid it out as a public way, or treated it as a public way, and up to the railroad the city did not consider it a public road; and that the grade was fair, but the road was somewhat stony, and not in such repair as he should expect the city to keep it in if it was a charge on the city.

Charles O. Davis testified that he had been a police officer in Newton for twenty-one years, and had lived there twenty-four years; that during that time he had known Greenwood Avenue, and seen that it was open and used for any use; that teams of all kinds, hacks, carriages, hay teams, etc., went across daily; and that he had no record of the number of houses, but should say there were twenty or thirty on the hill, and the inhabitants of these houses used the crossing.

The witness further testified, on cross-examination, that the city had not, to his own knowledge, kept this way in repair, or did not, so far as he knew, treat it as a public way.

Edward B. Trowbridge testified that he had lived in West

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Newton thirty-three years, and had known Greenwood Avenue during that time; that it was open and used by all kinds of vehicles, the same as any highway, and by anybody who wanted to go to the houses on the hill and to Mount Vernon Street, which leads from Newton to Newtonville; and that there were ten or a dozen houses on the hill where the people used this way now.

On cross-examination, he testified that the way had never been laid out as a public way, or treated by the city as a public way, to his knowledge, but on the contrary they had put up a sign that it was a private way; and that the first house put up on the Jenison land was put up forty years ago, and as houses have been built the travel has increased.

Charles H. Jenison testified that ever since 1835 he had lived within two or three hundred feet of Greenwood Avenue; that his father, Elias Jenison, in 1834 or 1835, owned the premises on the southerly side of the railroad where this avenue crosses it; that his recollection extended a good many years before they named it Greenwood Avenue; that he remembered it as a way or travelled place ever since he lived there; that it was since 1853 that it was called an avenue; that in 1853 the way led from Washington Street across the railroad track over the hill into Otis Street, a highway; that a considerable number of streets had been put in since; that the way was used for whatever people wanted to use it, and every one used it; that it was an open way; that it had been used in all the ways that any public thoroughfare would be used; and that the way had been open daily and the use was daily since 1853 or 1854, and had increased.

On cross-examination, he testified that his father owned about forty acres south of the track, extending about forty rods along the railroad, and this way was the way to get to that land, and was used to get to it; that from time to time parts of the land were sold, and houses built, and people living in the houses used the way; that he should say there were about twenty houses on the land south of the track now, and that this way was to get from Washington Street to this land; that he remembered when the railroad was built; and that at that time this land was a wood lot upon the hill, and this was the only way to get access to it from Washington Street.

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Charles B. Lentell testified that he was division roadmaster of the defendant's railroad, and had been for nine years, and had been for twenty-eight years in the employ of the defendant; that with the exception of a year or a year and a half he had been for all that time familiar with the region where this crossing is; that he had charge of the repairs of the road from Boston to Worcester; that he had repaired Greenwood Avenue, and kept it in repair, keeping the crossing very similar to private crossings; that it differed from public crossings in being on a smaller scale; that he thought that was the only difference; that he kept the planking in repair; and that the surface of Greenwood Avenue immediately outside of the railroad premises was like that immediately inside, — it was continuous, like the continuation of any road.

On cross-examination, he testified that the opening in the fence on the south side was very much less than at a public way; that there were no public way signs; that he did not put up either of the signs that are at the crossing; that the erection and maintenance of crossing signs is under the master carpenter's care; and that it was the duty of the witness to keep public and private crossings alike in a safe condition.

Walter Shepard testified that he was a civil engineer in the employ of the defendant; and that the roadmaster had charge of repairs at crossings.

On cross-examination, he testified that Greenwood Avenue, so far as he knew, was always treated by the defendant as a private way; that there had never been any recognition of it as a public way by the railroad company; that it was reserved in the original deed to the railroad company of that part of the railroad; that his information came from a deed from Elias Jenison to the Boston and Worcester Railroad Company in 1834; and that Jenison's property was south of the railroad, and extended several hundred feet along the road on the south side.

H. B. Chesley testified that he was the division superintendent of the defendant, and kept a record of the trains in and out of Boston; that on all four tracks one hundred and eighty-seven regular trains of the defendant crossed Greenwood Avenue on June 9, 1892, during the whole twenty-four hours of the day;

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that the express train in question left its depot in Boston on that day at twelve o'clock, noon, stopped from twenty-five to forty-five seconds at the crossing of the Boston and Providence Railroad, and would have to go a distance of two or two and one half miles to acquire a speed of forty-five miles per hour; that the distance from the defendant's depot in Boston to this crossing is about nine miles; and that no other train was scheduled to be at this crossing at the same time with this express train.

Edward A. Haskell testified that he was a civil engineer in the employ of the defendant; that from the nearest corner of the house in which the deceased resided to the opening in the board fence at the entrance to the crossing on the southerly line of the defendant's road was forty-four feet; that the width of this opening in the fence was thirteen and eight tenths feet; that from the nearest corner of the house to the southerly line of the track on which the accident happened was about ninety-five feet; that Greenwood Avenue was ascending all the way, and the highest point of the bank was twenty-seven and one half feet above the track; that the fence was six and one half feet high, and constructed of boards seven eighths of an inch thick, placed from one half to three quarters of an inch apart, so that to see through the fence one must be very nearly opposite; that there were two sign-boards, one inside and one outside of the fence, on the north side of the railroad; that there were none on the southerly side; that the board inside the fence was a rectangular sign-board twenty-six inches by twelve inches; that there were two sign-boards on the post outside, about the same size; that the signs were perfectly legible, the one inside being old, the one outside new; that there was no sign with the words, "Railroad Crossing, Look out for the Engine," on it, no gate at the crossing, and no flagman; that Greenwood Avenue, after crossing the defendant's road, entered immediately into Washington Street on the north; that there were electric railway tracks on Washington Street, and near the crossing a white stopping-post, at which the cars on the electric railway stopped; that starting from the crossing the railroad went straight to the west for four hundred and fifty feet, and then curved northerly as you faced to the west; that going easterly from the crossing the

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railroad was straight for eight hundred and fifty feet, and then began to curve; that the roadbed lay along the base of a hill, close in to it; that there were houses on Greenwood Avenue, but that they were not numerous; that the roadbed at the crossing was the ordinary roadbed; that there were planks laid down between the rails, spiked down to the cross ties, flush with the rails, with an opening on the flange side of the rails for the flanges of the wheels to pass through; that there was the ordinary and usual preparation for a crossing, and the width of the place prepared for the crossing was ten and one half feet across; that there was no distinction between the way for foot passengers and for carriages; and that outside of the planks and within the location was gravel, of about the same width as the planking, and uniform with the approach on Greenwood Avenue on either side.

On cross-examination, he testified that the preparation for this crossing was the same as that for the crossing of private ways; that there had been no signs to look out for the engine since he knew the crossing; that the rectangular sign-board within the railroad premises had on it, "Dangerous Passing, This is a private way"; that the other two sign-boards had on them, one, "Not a public way, Dangerous," the other, "Greenwood Avenue, Ward 3"; that the rectangular sign-board was square with the railroad track, and the two signs on the outside of the fence were skewed round so as to face Washington Street; that he knew the crossing signs used at public ways, and never knew one at this way; and that a person at the opening in the fence on the southerly side of the crossing could see a person on the track where the accident happened eleven hundred feet away.

At the close of the evidence, the judge directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

J. C. Ivy, for the plaintiff.

Samuel Hoar, (*W. Hudson* with him,) for the defendant.

ALLEN, J. In order to support the first count of the declaration, it became necessary at the trial for the plaintiff to show that the crossing over the railroad at which the collision occurred had become a highway or town way by prescription; this count being founded on Pub. Sts. c. 112, § 213. We have

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to determine whether the plaintiff had sufficient evidence to entitle him to go to the jury on this question.

In order to show a public way by prescription, it was necessary for the plaintiff to prove an adverse use continued without interruption for twenty years, and an acquiescence in such use by the defendant. Washb. Easements, 86. Adverse use means a use under a claim of right, as distinguished from a use which was permitted. The points which we have to consider are, whether there was evidence of a public use for twenty years under a claim of right, and whether there was evidence of an acquiescence in such use.

It is to be noticed, in the first place, that the origin of the way, according to the testimony, was by reservation in the original deed of the premises to the defendant, given in 1834 by Elias Jenison, who owned some forty acres of land on the south side of the railroad. The way was never laid out as a public way, but it led from a highway on the north of the railroad to Jenison's land on the south; and this land has since been used for buildings, so that now there are twenty or thirty houses upon it, and in 1853 the name of Greenwood Avenue was given to the way, and the use of it has much increased, so that, according to the testimony of the witness who gave the highest estimate, from one hundred to one hundred and fifty persons a day pass over it at present.

The fact that there was a private way across the railroad by reservation does not prevent the public from gaining a right to use the way by prescription; *Fitchburg Railroad* v. *Page*, 131 Mass. 391; *Ballard* v. *Demmon*, 156 Mass. 449, 453; but heretofore we have had occasion to observe that the existence of a private way makes it necessary to examine with more care the alleged public use, to see whether after all it has the characteristic of a use under a claim of right, as distinguished from a use of the private way which was assented to or permitted. *McCreary* v. *Boston & Maine Railroad*, 153 Mass. 300, 305. See also *Smith* v. *New York & New England Railroad*, 142 Mass. 21. If one in walking or driving finds a way open before him, and uses it because it seems to be intended for such use, this alone does not show that he uses the way as a matter of right, and such use would not establish a prescriptive right, no matter

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how frequent or how long continued it might be. Merely from using what is open to use, without more, no presumption arises that the use is adverse. *Thomas* v. *Marshfield*, 13 Pick. 240. *Kilburn* v. *Adams*, 7 Met. 33. *Hall* v. *McLeod*, 2 Met. (Ky.) 98. Washb. Easements, (4th ed.) 135. In other words, there must be something to show that the way is used as a public way, rather than as an open private way. *Sargent* v. *Ballard*, 9 Pick. 251. This is illustrated by the example of the private streets which exist in some of our manufacturing cities. They are in appearance undistinguishable from public streets; they are kept constantly open, and in such a condition that all persons who choose can use them freely. But they remain private ways, unless use by the public under a claim of right is shown. *Durgin* v. *Lowell*, 3 Allen, 398. *Danforth* v. *Durell*, 8 Allen, 242. It has sometimes been suggested that the comparative amount of rightful private use and of the public use which is without absolute right is an important element in determining whether such public use is under a claim of right. No doubt the amount of such unauthorized use may be considered as tending to show a use under the belief that the way is a public one; but the final test is, not whether it is greater or less in amount than the rightful private use, but whether it is of such a character as to show the assertion or assumption of a right so to use the way, or a use under the belief that such use is a matter of public right. See *Weld* v. *Brooks*, 152 Mass. 297; *Taft* v. *Commonwealth*, 158 Mass. 526, 552. In order to show such adverse use by the public it is not necessary that each or any traveller should in express words declare that he claims the right as one of the general public to travel over the way in question. *Blake* v. *Everett*, 1 Allen, 248. Nor is it easy to express in what particular manner such assertion of right should be shown. Nevertheless the fact must exist that the way is used as a public right, and it must be proved by some evidence which distinguishes the use relied on from a rightful use by those who have a right to travel over the private way, and also from a use which is merely casual, or incidental, or permissive. The amount, character, and duration of the use of a way by persons who had no lawful right to use it may have been such as to tend to show that such use was under the belief that the way was public. But the burden of proof being upon

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the plaintiff, we are to see if the evidence introduced in this case was sufficient to warrant a finding of a public way by prescription, bearing in mind that a mere scintilla of evidence is not enough. *Hillyer* v. *Dickinson*, 154 Mass. 502. *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 284. If all the evidence which was introduced was equally consistent with the view that the uses relied on were of the latter character, the plaintiff failed to sustain the burden of proof resting upon him to show a use under a claim of right. *Sargent* v. *Ballard*, 9 Pick. 251, 256. *Smith* v. *First National Bank*, 99 Mass. 605. *Griffin* v. *Boston & Albany Railroad*, 148 Mass. 143.

Let this view of the case be tested by an illustration. If one who has no right to pass over a way nevertheless persists in doing so, in the assertion of a right to use it, without the assent of the owner of the premises, he is subject to an action for the trespass. Upon the testimony introduced in this case, would the railroad company be entitled to go to the jury in an action brought for trespass against any of those who have used the way now in question? Is there any evidence to show that any such use was in the assertion of an adverse right, or without the acquiescence of the railroad company? If not, it goes to show that the plaintiff has not sustained the burden of proof. *Felton* v. *Simpson*, 11 Ired. 84. Washb. Easements, (4th ed.) 86, 87.

It was incumbent on the plaintiff, not merely to show an adverse public use, under claim of right, continued for twenty years, but also that during that period the defendant acquiesced therein. *Hennefin* v. *Blake*, 102 Mass. 297. Acquiescence implies that the defendant knew, or had reason to believe, that there was such an adverse use. The crossing might be used as of private right by the occupants of the twenty or thirty houses built upon the land formerly belonging to Jenison. For their convenience, the way was extended to highways still further south. Persons having legitimate occasion to go to or from those houses might also rightfully use the crossing. Under these circumstances, the defendant was not bound, and probably was not at liberty, to obstruct the crossing by bars or by a gate. *Williams* v. *Clark*, 140 Mass. 238. Looking at it practically, the railroad company might find a difficulty in distinguishing between those who had a right to pass over the crossing and those who had

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not. It could hardly be expected that a personal inquiry should be put to each person seeking to cross, who was not known to have a right to do so, nor is the mere posting up of a sign "Private way" to be deemed a prohibition of passage by others than those entitled as of right to pass along the way. *O'Connor* v. *Boston & Lowell Railroad*, 135 Mass. 352. If Pub. Sts. c. 122, § 3, are applicable to railroad corporations, it may be that the acquirement of a public right could be prevented by posting a notice as therein provided. *Ballard* v. *Demmon*, 156 Mass. 449, 453. But the omission to post such notice certainly does not show that the defendant was aware that the crossing was used by a portion of the public under a claim of right, even if the fact was so. In determining whether there was such acquiescence as is necessary in order to establish a public right, it must always be borne in mind that mere permission is not enough. There must be something to show that such permission was accompanied with knowledge or reason to believe that the crossing was used under a claim of a public right. Until then, no question of acquiescence can arise.

In view of these explanations of the rules of law, it remains to see how far the evidence introduced meets their requirements. Without reciting it in detail, the evidence, in addition to matters already referred to, was to the following effect. Greenwood Avenue never had been repaired by the city, or treated by it as a public way, on either side of the railroad. There was much, also, which was quite obvious to the eye, to call attention to the true character of the way. Southerly of the railroad there was a steep ascent, which was not kept in such repair as would be expected if it were a charge upon the city. The way on that side passed through an opening in the fence, less than fourteen feet wide, which was much less than is usual at a public crossing. The general use of the avenue was mainly for the houses situated upon it, but incidentally also it was used by persons going through the avenue to reach some point beyond. Anybody used it who wished to do so, and with teams and vehicles of various descriptions. At the crossing the defendant had put up within its premises a sign saying, "Dangerous passing. This is a private way." On the outside of the fence, the city also had put up a sign saying, "Not a public way. Dangerous." There

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was no sign-board such as is required by statute where a public way and railroad cross each other on a level. Nobody was actually stopped from using the crossing. Anybody crossed there who wished to do so. No witness testified that he thought or asserted a claim that there was a public right to cross there, or that he made it known in any manner that he claimed such right. There was a general statement that the way was used the same as any highway; but no fact was testified to showing that any person who used the way or the crossing, and not having the right to do so under the reservation in the deed, did so under the belief that there was a public right to do so; much less, that he did or said anything to show such an assertion of a general public right as to distinguish him from casual travellers over the way who accepted and acted upon the permission which might be inferred or assumed from the fact that the way was left open to be used as a private way. We find nothing in the testimony inconsistent with the supposition that everybody who passed over the crossing saw the signs, or knew otherwise, or had reason to believe, that it was not a public way, and used the crossing recognizing that it was not. The acts of crossing which were testified to were as consistent with this view as with the assumption that they were under a claim of a general public right. The evidence falls still further short of showing acquiescence by the defendant in such an adverse use. It goes no further than to show a permission or assent by the defendant that others besides those entitled of right to cross at that place might use the crossing at their own risk. It does not show that the defendant knew or had reason to believe that they were using the crossing on any other terms than under its permission. *Deerfield* v. *Connecticut River Railroad*, 144 Mass. 325, 338–340.

The cases of *Fitchburg Railroad* v. *Page*, 131 Mass. 391, and *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57, which are relied on by the plaintiff, are distinguishable from the present case in various particulars.

There being no sufficient evidence to entitle the plaintiff to go to the jury upon the first count, we come to the second count, which was founded on Pub. Sts. c. 112, § 212. In order to support this count, it was necessary for the plaintiff to show that

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the deceased was herself in the exercise of due diligence. The plaintiff's evidence shows the contrary. It was an act of carelessness for the deceased to enter upon and attempt to cross the railroad tracks as she did. The approaching train might have been seen a long way off. She did not look for it. She was hurrying along over the tracks, taking no precautions for her safety. It is a plain case of a failure to show due diligence on her part. *Moore* v. *Boston & Albany Railroad*, 159 Mass. 399. *Tyler* v. *Old Colony Railroad*, 157 Mass. 336, 339, 340, and cases there cited.

The direction to return a verdict for the defendant was right.

Exceptions overruled.

PATRICK McCANN *vs.* CITY OF WALTHAM.

Middlesex. January 21, 1895. — March 26, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence of Superintendent of Streets — Liability of City — Employers' Liability Act.

The charter of a city created a board of street commissioners, and in terms took away the power of the city to superintend and direct the board in detail. By an ordinance of the city the street commissioners were to perform the duties and to have the powers of road superintendents and surveyors of highways, and were to appoint a superintendent and an assistant superintendent, who should be under their direction and control. A person was injured, through the alleged negligence of the assistant superintendent of streets, by the falling upon him of a bank while digging gravel from the city's land to be used in repairing one of its streets. *Held*, that he could not maintain an action against the city for his injury.

HOLMES, J. This is an action for personal injuries caused by the fall of a bank upon the plaintiff while he was digging under it. He seeks to charge the defendant, under St. 1887, c. 270, on the ground of the negligence of the assistant superintendent of streets. We assume that the statute applies to cities, but it does not change the law of agency. See *Pettingell* v. *Chelsea*, 161 Mass. 368. Therefore the plaintiff cannot re-

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cover, even if in other respects he has made out a case, if the superintendent of streets was a public officer, as that phrase has been used in the cases, and was acting as such at the time.

We must take it that the superintendent was acting officially in the ordinary way, and that there were no special circumstances which made him an agent and servant of the city for the time being, if he was not so by reason of his office. The work was being done by men of the street department, and consisted of digging gravel to be carried to Orange Street, where the superintendent was repairing the public street. It is true that the gravel was dug from land belonging to the city, and we will assume that the removal of the gravel by lowering a knoll made the land more valuable. The plaintiff offered evidence to that effect, which was excluded, but in our opinion it makes no difference in the result. It remains also true that the work in its immediate character was repairing a street, and the fact that the city accidentally was able to derive an incidental advantage from it does not change the principles to be applied. *Curran* v. *Boston*, 151 Mass. 505.

The charter of the city of Waltham required the board of aldermen to elect three street commissioners. St. 1884, c. 309, § 23. It also provided that "the board of aldermen may by its orders and ordinances prescribe the duties of and direct and control the administrative boards and officers in the performance of their duties; but shall not, through its committees or otherwise than by such formal acts, exercise any authority over the administrative officers." § 15. Thus the board of street commissioners is created by statute, and the power of the city to superintend and direct it in detail is taken away in terms. By the ordinance attached to the bill of exceptions, the street commissioners are to perform the duties and to have the powers of road superintendents and surveyors of highways, and they are to appoint a superintendent, and on certain conditions an assistant superintendent, who shall be under their direction and control. The superintendent and assistant superintendent are only the hands of the street commissioners, and a part of the organization which as a whole takes the place of a surveyor of highways. As is well known, a town is not answerable for the acts of surveyors of highways. The case is unlike *Waldron* v. *Haver-*

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hill, 143 Mass. 582, where the superintendent acted under the direction of a committee of the city council, and the city was considered to be performing work by means of agents of its own. Here the defendant's position is quite as strong as it was in *Prince* v. *Lynn*, 149 Mass. 193, or *Hennessey* v. *New Bedford*, 153 Mass. 260. See also *Pratt* v. *Weymouth*, 147 Mass. 245, 254; *Walcott* v. *Swampscott*, 1 Allen, 101.

Exceptions overruled.

H. N. Allin & G. L. Mayberry, for the plaintiff.

C. M. Ludden, for the defendant.

HUDSON ELECTRIC LIGHT COMPANY *vs.* INHABITANTS OF HUDSON.

Middlesex. January 21, 1895. — April 1, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Obligation of Town to purchase Electric Light Plant — Vote of Town — Right of Town to rescind Vote — Filing of Petition for Adjudication — "Apply by Petition" — Statute.

The St. 1891, c. 370, § 1, authorized any city or town to purchase and maintain within its limits a plant for the manufacture or distribution of gas or electricity. Section 8 provided as follows: "No town shall exercise the authority conferred in section one until after a vote that it is expedient to exercise such authority shall have been passed by a vote of not less than two thirds of the voters present and voting at each of two legal town meetings duly called for the purpose, of which meetings the second shall be held at an interval of not less than two nor more than thirteen months after the first." A warrant for a town meeting contained the following article: "To see if the town will vote to exercise the authority conferred in section one" of the statute, "or do or act anything respecting the same." Under this article the town voted "that the town do exercise the authority conferred in section one" of the statute, more than two thirds of the voters present and voting having voted in the affirmative. Another meeting was held more than two months later, at which there was a vote under an article in the same form as the other, and the language of the vote was the same as that at the former meeting, except that the words "that it is expedient for the town . . . to exercise the authority" were used instead of the words "that the town do exercise the authority." At this meeting more than two thirds of the voters present and voting voted in the affirmative. *Held*, that, considering the whole proceedings together, the first vote taken by the town was sufficient under the statute.

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After a town has voted at two separate town meetings called as required by St. 1891, c. 370, § 8, that it is expedient to exercise the authority conferred by § 1 to purchase and maintain a plant for the manufacture or distribution of gas or electricity, after the schedule required by § 13 has been filed with the town clerk, and after a petition has been filed in this court under that section, to enforce the obligation of the town to purchase the petitioner's plant, the town cannot, by a subsequent vote, relieve itself from its liability so to purchase such plant.

The filing in the clerk's office of this court within the time required by St. 1891, c. 370, § 13, of a petition to enforce the obligation of a town to purchase an electric light plant, is an application by petition to this court for "an adjudication between the parties," within the statute.

PETITION, under St. 1891, c. 370, § 13, to enforce an alleged obligation of the respondent town to purchase the electric plant and other property of the petitioner. Hearing before *Holmes*, J., who, at the request of both parties, reported the case for the consideration of the full court; such decree to be made as equity might require. The facts appear in the opinion.

S. K. Hamilton & R. E. Joslin, for the petitioner.

Samuel Hoar, for the respondent.

KNOWLTON, J. 1. The first question in this case is whether the vote taken on July 1, 1891, was such as is intended by the St. 1891, c. 370, § 8. The language of the statute is as follows: "No town shall exercise the authority conferred in section one until after a vote that it is expedient to exercise such authority shall have been passed by a vote of not less than two thirds of the voters present and voting at each of two legal town meetings duly called for the purpose, of which meetings the second shall be held at an interval of not less than two nor more than thirteen months after the first." The article in the warrant under which the vote was taken was, "To see if the town will vote to exercise the authority conferred in section one of chapter 370 of the Acts of the Legislature of the Commonwealth of Massachusetts for the year eighteen hundred and ninety-one, entitled, An Act to enable cities and towns to manufacture and distribute gas and electricity, or do or act anything respecting the same." The vote was, "That the town do exercise the authority conferred in section one of chapter 370," etc., more than two thirds of the voters present and voting having voted in the affirmative. Another meeting was held on September 2, 1891, at which there was a vote under an article in precisely the same

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form, and the language of the vote was the same as that at the former meeting, except that the words "that it is expedient for the town of Hudson to exercise the authority" were used instead of the words "that the town do exercise the authority." At this meeting more than two thirds of the voters present and voting voted in the affirmative.

To the former vote it is objected that the words "it is expedient" were not used. But, considering the whole proceedings together, we are of opinion that the action of the town was taken under the section referred to, and that the vote must be taken to be a formal decision by the town that it is expedient to exercise the authority conferred by the statute. There is no other reasonable explanation of the town's action at this meeting. The determination by the town to exercise the authority necessarily included a decision that it was expedient to exercise it. The meaning of the vote is to be gathered from the entire record, and we are of opinion that the record makes its meaning clear.

2. It is contended that the votes of the town taken after the petitioner filed with the town clerk the schedule required by § 13 of this statute, and after this petition was filed with the clerk of the Supreme Judicial Court, relieved it from its liability to purchase the property of the petitioner.* But it has been expressly held that the two votes of the town in a case like this fix the rights of a party that desires to sell a gas or electric plant, and if proper measures are taken to enforce its rights they cannot be affected by a subsequent attempt on the part of the town to rescind. *Citizens' Gas Light Co.* v. *Wakefield*, 161 Mass. 432. *Braintree Water Supply Co.* v. *Braintree*, 146 Mass. 482. *Hall* v. *Holden*, 116 Mass. 172.

3. In order to enforce its rights under the votes it was necessary for the petitioner, under § 13, not only to file with the clerk

* At town meetings held on September 16, 1891, and January 8, 1892, respectively, two successive committees were appointed by the defendant town to investigate the whole subject of municipal lighting. These committees successively reported, recommending that the town should not engage in the business of municipal lighting. At a town meeting held on March 15, 1892, a motion "that the town deems it expedient to buy or put in an electric plant" was rejected; and the reports of the committees were accepted and adopted.

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of the town within thirty days after the passage of the final vote a schedule of the property to be sold, but also within sixty days after the filing of the schedule to "apply by petition to the Supreme Judicial Court, or any justice thereof, setting forth the facts, and praying an adjudication between the parties," etc. The petition in this case, which is in accordance with the requirements of the statute, was filed in the office of the clerk of the Supreme Judicial Court within the time prescribed, but it was not brought to the attention of any justice of the court, nor were any proceedings had under it until about two years and a half afterwards. It is contended that the filing of this petition in the clerk's office was not an application to the court within the meaning of the statute, and that therefore the petition must be dismissed. Ordinarily it would seem that to file such a petition in the office of the clerk of the court is to "apply by petition" to the court, for when such a petition is filed it is before the court for appropriate action in accordance with its prayer. Any party interested in it can bring it to the attention of a justice and have proceedings taken under it. Suits that are to be commenced by filing a petition in court are usually deemed to be commenced at the time of the filing, and we think we are not warranted in giving to this statute a construction different in this particular from that generally given to similar requirements. Pub. Sts. c. 49, § 106; c. 178, §§ 2, 7; c. 191, § 10. Under St. 1885, c. 384, § 2, the Supreme Judicial Court is always open in every county, and there are no longer any terms thereof. The petition when filed was before the court for immediate action. We are of opinion, therefore, that the petitioner applied by petition to the court within the meaning of the statute when it filed its petition in the clerk's office, and that this part of the defence fails. Whether there was any such act or neglect on the part of the petitioner, in connection with the filing of the petition or subsequently thereto, as to preclude the prosecution of the petition on the ground of laches, depends upon facts and considerations that are not fully reported.

Commissioners are to be appointed, unless an application is made by the respondent for a hearing on the question whether the petitioner lost its right to proceed by its failure to prosecute the petition within a reasonable time after it was filed.

So ordered.

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GRANT M. PALMER *vs.* EBEN D. JORDAN & others.

Suffolk. November 19, 1894. — April 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Insolvent Debtor — Conclusiveness of Assignment — Validity of Purchase from Debtor pending Insolvency Proceedings.

An assignment in insolvency is conclusive evidence, in an action by the assignee for the conversion of the insolvent's goods, of the plaintiff's authority to sue, and it is not open to the defendant to contest the validity of the insolvency proceedings.

The title of a purchaser of property in good faith, after the seller has filed a petition in insolvency, is invalid as against that of the latter's assignee.

HOLMES, J. This is an action for the conversion of a stock of goods, brought by the assignee of one Gibb against purchasers of the stock from Gibb. The purchase was made after Gibb had filed a petition in insolvency. The date of the assignment to the plaintiff does not appear, but before the purchase by the defendants, which was on January 28, 1893, a warrant had issued from the Court of Insolvency, signed by the judge in the usual form, under Pub. Sts. c. 157, § 17, directing the messenger to take possession of Gibb's estate, and to publish notice of a meeting of creditors for the proof of debts and the choice of an assignee. Notice had been published on the following day, December 17, 1892, as directed. At this time proceedings were pending for a composition, and evidence was offered tending to show that the form of the warrant was a mistake, as not following the petition on which it was granted, and otherwise, and that it should have been a warrant under § 113, simply directing the messenger to keep the property until further order of the court. An exception was taken to a ruling that the warrant was issued by the court. But, apart from other difficulties in the way of the argument, the assignment is conclusive evidence in this suit of the plaintiff's authority to sue, and it is not open to the defendants to contest the validity of the proceedings. Pub. Sts. c. 157, § 51. *Howes* v. *Burt*, 130 Mass. 368. See *Richardson* v. *Hazelton*, 101 Mass. 108. As the assignment is conclusively valid, it must have had the statutory

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effect to vest in the plaintiff all the property of Gibb which Gibb could have conveyed or which might have been taken on execution upon a judgment against him on December 17, 1892. § 46. It follows that the foregoing and other exceptions founded on alleged irregularities in the insolvency proceedings must be overruled.

It appeared that a little more than a month before the filing of the petition in insolvency Gibb had formed a partnership with one Plumer, under which it was contended that Plumer became jointly interested with Gibb in the stock, and as the defendants are found to have purchased in good faith from Gibb, although without knowledge of the partnership, it is argued that they are entitled to the benefit of that circumstance, and are to stand as *bona fide* purchasers from the firm. But it is found as a fact that the partnership was fraudulent and void as against the creditors of Gibb. We do not regard the bill of exceptions as purporting to set forth the evidence on which this finding was based, notwithstanding the statement that there was no evidence on behalf of the plaintiff other than that set forth material to the questions raised by the bill. But it appears that the defendants introduced evidence not stated that Plumer was in possession jointly with Gibb and acted as partner, but that the court found the contrary, and, connecting these facts with the date of the partnership agreement and the probably illusory mode of paying the note of $1,000 which Plumer gave for his interest, (which was to be paid by the transfer to Gibb of Plumer's one fifth of the net profits of the business,) the conclusion was not a very hard one to reach. Taking it as found, that the partnership was fraudulent, the assignment would have vested all the so called firm's property in the assignee, at his election, as of a date before the defendants' purchase, if no purchase had been made. *Freeland* v. *Freeland*, 102 Mass. 475, 477. *Gibbs* v. *Thayer*, 6 Cush. 30, 33. *Morgan* v. *Abbott*, 148 Mass. 507.

The purchase can make no difference. The case is not like the transfer of a title got by fraud to a *bona fide* purchaser when no proceedings are pending. Proceedings were pending the effect of which if carried out would be to vest this property in the assignee. The statute is absolute that the assignment shall

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vest "all" such property in him. § 46. It certainly did not intend to leave it in the power of the insolvent in the mean time to defeat the proceedings and the express words of the enactment. In *Judd* v. *Ives*, 4 Met. 401, 403, the effect of the statute is put even more strongly, and it is said that the debtor is devested of his property even before the assignment, and that the property by the act of publication is placed in the custody of the law. We do not think that the matter needs fuller discussion. *Stevens* v. *Mechanics' Savings Bank*, 101 Mass. 109. *Butler* v. *Mullen*, 100 Mass. 453.

The foregoing are the only questions which it is necessary to deal with, although other rulings were made which were merely speculative in view of the findings of fact.

Exceptions overruled.

H. G. Nichols, for the defendants.

A. E. Pillsbury & G. M. Palmer, for the plaintiff.

GEORGE PATTEE *vs.* DENNIS A. PAIGE & another.

Middlesex. November 22, 1894. — April 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Insolvency of two Firms consisting in part of same Members — Non-resident Creditor — Discharge — Action.

If two firms consisting in part of the same members are included in the same proceedings in insolvency, and a non-resident creditor holds a claim against each firm and proves against only one of them, and votes for assignee, and takes a dividend thereon, the granting of a discharge to the debtors will not debar him from subsequently maintaining an action upon the other claim.

CONTRACT, upon a promissory note for $808.91, dated September 16, 1887, signed by Paige and Gove, and made payable on demand to the order of the plaintiff. The case was submitted to the Superior Court, and, after judgment for the plaintiff, — execution to issue against the goods and estates of the defendants, but not against their bodies, — to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

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The case was submitted on the briefs to all the judges.

G. A. Blaney & S. Robinson, for the defendants.

F. H. Williams & F. M. Copeland, for the plaintiff.

ALLEN, J. It is well settled and familiar that a non-resident creditor is not barred of his claim by a discharge in insolvency granted here, unless he has come in and submitted himself to the jurisdiction of the court. *Phœnix National Bank* v. *Batcheller*, 151 Mass. 589. If he thus comes in and proves his claim and takes a dividend, or if he accepts the sum offered under composition proceedings, he is held to have waived this right of objection. *Murray* v. *Roberts*, 150 Mass. 353. *Eustis* v. *Bolles*, 146 Mass. 413; *S. C.* 150 U. S. 361.

In the present case there were two firms, Paige and Gove, and Crosby, Paige and Gove. The latter firm consisted of the members of the former firm with the addition of Crosby. Both firms were included in the same proceedings in insolvency, and the plaintiff, a non-resident, held a claim against each firm. He proved only the claim against Crosby, Paige, and Gove, and voted thereon for assignee and took a dividend therein. It is not stated whether his vote affected the choice of assignee or not. The question is, whether his claim against the other firm and its members is thereby barred, a discharge having been granted to the debtors.

No objection has been raised to the method of including both firms in the same proceedings in insolvency. There was nothing beyond the facts already stated to show an intention on the part of the plaintiff to waive his right to pursue his present claim by an action at law.

The statutes do not in terms provide for a case where the same persons are members of more than one firm. In England a practice grew up by which a commission in bankruptcy against several partners would include not only the individual members, but all minor partnerships existing amongst them as well, distinct accounts being kept. Under this practice, a general order was passed by Lord Rosslyn, in 1794, that under a joint commission against a firm separate debts might be proved as of course, without filing a special petition for liberty to do so. 2 Christ. Bankr. (2d ed.) 31, 32. And it was held that creditors of a minor firm consisting of some of the members of the larger

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firm might in like manner prove their claims. *Ex parte Worthington*, 3 Madd. 26. But a creditor whose claim was against the firm and also against one or more of its members could not make double proof, even though the obligation was created by different instruments. *Ex parte Bevan*, 10 Ves. 107. Robson, Bankr. 726–728. This however was altered by the bankruptcy acts of 1861 and 1883, so that double proof might be made; and it was held that the fact that an individual partner had given security for the debt could not prevent the creditor from proving against the firm without giving up his security, the reason being that the joint and separate estates are considered in the administration of the property in bankruptcy as distinct estates. Robson, Bankr. 729–731, and cases cited.

In Massachusetts double proof is allowed, without any express statute authorizing it. *Roger Williams National Bank* v. *Hall*, 160 Mass. 171. And although the proceedings are joint, this is rather as a matter of convenience. It was held in England that the jurisdiction to supersede prior proceedings against one partner, upon the institution of proceedings which embraced the firm, was entirely discretionary, and would be determined by considerations of convenience. *Ex parte Rowlandson*, 1 Rose, 416. Robson, Bankr. 687. The practice in this country seems to have been the same. *In re Mitchell*, 3 Nat. Bankr. Reg. 441. *In re Stevens*, 5 Nat. Bankr. Reg. 112; *S. C.* 1 Sawyer, 397. And where one of the partners of a bankrupt firm was also a member of another firm which had a claim against the bankrupt firm, the claim was allowed to be proved, the two firms being regarded as distinct legal entities, capable of contracting with each other in equity. *In re Buckhause*, 10 Nat. Bankr. Reg. 206. In the present case, the transactions of the different firms were distinct, and for most purposes the estates are also considered as distinct. The plaintiff's claim against the defendants is not the same as that which he proved in insolvency. And we are of opinion that the waiver which is implied by his act of proving a claim against one of the partnerships does not extend to his claim against the other.

Merely proving the claim of itself signifies but little. A claim, after being proved and allowed, may be withdrawn by leave of court, and being so withdrawn no consequence follows

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from the fact of its having been so proved. *Morse* v. *Lowell*, 7 Met. 152. *Safford* v. *Slade*, 11 Cush. 29. *Franklin County National Bank* v. *Greenfield Bank*, 138 Mass. 515, 526. *Nichols* v. *Smith*, 143 Mass. 455. In *Bemis* v. *Smith*, 10 Met. 194, it was held to be the right of a creditor, under the circumstances there shown, to withdraw his proof without leave of court, in order to use his claim by way of set-off.

The fact of a creditor's having voted for assignee, and even of having by his vote controlled the choice, settles nothing conclusively. After having done so, he may still by leave of court withdraw the claim so voted upon, in order to avail himself of advantages which he would lose if the proof stood. *Franklin County National Bank* v. *Greenfield Bank*, 138 Mass. 515. *Nichols* v. *Smith*, 143 Mass. 455.

The taking of a dividend by the plaintiff upon his claim against one firm ought not to affect his claim against the other firm. No decision has come to our notice where this question has been determined. We need not consider how it would be if both claims were against the same firm, or the same individual, and only one of them was proved; or if a creditor held two claims, one fiduciary and the other not, and only proved the latter. We limit ourselves to the question which is now presented. If two firms consisting in part of the same members are included in the same proceedings in insolvency, and a non-resident creditor holds a claim against each firm, and proves against only one of them, and votes for assignee and takes a dividend thereon, the granting of a discharge to the debtors will not debar him from subsequently maintaining an action upon the other claim.

For these reasons, in the opinion of a majority of the court, the entry must be,

Judgment for the plaintiff affirmed.

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OLD COLONY RAILROAD COMPANY, petitioner.
IN RE PETITION OF KATHARINE C. LEFSTROM.

Suffolk. December 7, 1894. — April 2, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, & LATHROP, JJ.

Abolition of Highway and Railroad Crossings at Grade — Confirmation of Report of Commissioners — Right of Landowner to appear and object — Power of Court to revise Decision of Commissioners.

An owner of land taken by a decree of commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, is entitled, after the report of the commissioners has been filed in the Superior Court, to present in that court objections to the confirmation of the report, and to be heard thereon.

The decision of commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, on the question whether the quantity of land taken at a particular point is reasonably necessary for the convenient construction of the work, is final, in the absence of irregularity of procedure or of gross error, and cannot be revised by this court upon the petition of the landowner.

PETITION, under St. 1890, c. 428, by the directors of the Old Colony Railroad Company, for the abolition of a certain grade crossing in Boston. Hearing in the Superior Court, before *Hammond*, J., who reported the case for the determination of this court. The facts appear in the opinion.

J. H. Benton, Jr., for the railroad company.

H. W. Putnam, for Katharine C. Lefstrom.

KNOWLTON, J. The justice of the Superior Court, by his report, presents two questions, first, whether Katherine C. Lefstrom, the petitioner for a modification of the report of the commissioners, is entitled as matter of right, before confirmation of the decision of the commissioners, to become a party to the suit and be heard in that court upon the question she raises; and secondly, whether the court has power to revise the action of the commissioners and try the question whether more land is taken than is reasonably necessary. If both of these questions are answered in the affirmative, the case is to be remanded for further proceedings; otherwise, her petition is to be dismissed. The questions depend on the construction to be put upon St.

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1890, c. 428, § 4. The proceedings are under that statute and the subsequent statutes of 1892, c. 433, and 1893, c. 126. By the first mentioned statute the Legislature provided for the creation of a tribunal to determine all questions of fact involved in an application for the abolition of a grade crossing, namely, a board of commissioners consisting of three disinterested persons, to be appointed by the Superior Court. The statute prescribes the duties of these commissioners, and requires that they shall forthwith return their decision into the Superior Court. "The decree of the court confirming the decision of the commission shall be final and binding." The sentence last quoted is the only language in the statute which expressly gives the court power to deal in any way with the questions to be considered by the commissioners. This language gives the court power to confirm or reject the report. *Norwood* v. *New York & New England Railroad*, 161 Mass. 259. *Kingman, petitioner*, 153 Mass. 566, 579, and cases there cited. If there were no such express provision, the general requirement that commissioners be appointed by the court who are to make a report to the court would impliedly give the court power to act upon the report. *Boston & Worcester Railroad* v. *Western Railroad*, 14 Gray, 253, 258. *Wrentham* v. *Norfolk*, 114 Mass. 555, 561. *Wyman* v. *Eastern Railroad*, 128 Mass. 346.

Persons whose land is taken under a decree of the commissioners are to receive compensation, and, if they fail to agree with the other parties interested in regard to the amount, they are entitled to an assessment by a jury. But such persons have no constitutional right to a hearing upon the question whether their land shall be taken. *Lynch* v. *Forbes*, 161 Mass. 302. *Collins* v. *Holyoke*, 146 Mass. 298. *Brock* v. *Old Colony Railroad*, 146 Mass. 194. *Holt* v. *Somerville City Council*, 127 Mass. 408. *Kuschke* v. *St. Paul*, 45 Minn. 225. When charters have been granted to railroad corporations in this Commonwealth, landowners along the route have never been made parties to the proceedings for fixing the location, and under our general railroad law, when the route is to be fixed, the only notice required is by publication and posting, which may or may not reach the individual owners whose land is taken. Pub. Sts. c. 112, § 89. In reference to the question what land shall be

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taken, the interest of landowners is to be considered only as they are a part of the public. The interest of every individual is to be regarded, so far as it is apparent, in determining what is the interest of the general public. Every public measure which has local features affects the interest of some members of the public more than that of others, and all interests should be weighed in ascertaining the general interest. Landowners whose property is liable to be taken are not made parties by the statute now before us, and they have no legal right to be heard. Where notice of a hearing is given to the public they may be heard as a part of the public, and ordinarily in cases of this kind a tribunal whose action is liable to affect important interests desires to hear those who will be most affected. In this case it appears that the petitioner Lefstrom was fully heard by the commissioners on the question which she now desires to raise before the Superior Court. She was not an original party to the cause, and has not the rights of a party in any part of the proceedings.

But after the commissioners had determined to take her land, and had filed in court their report of their doings, showing a taking of her land, she had an interest different from that of the general public in the question whether their report should be confirmed. The confirmation of the report, and the recording of it and of the decree of the court in the registry of deeds, would constitute a taking of the land which would be binding upon her. St. 1890, c. 428, § 4. If there was error in the proceedings of the commissioners, she could not have it corrected by a writ of certiorari, as she could if the judgment or decree was by the county commissioners or some similar tribunal. Her only opportunity to be heard on the question whether the taking of her property by the commissioners was regular and legal was before the court after the filing of the report. Her interest was such as to entitle her to call in question the legality of their action, and in a similar case before county commissioners to prosecute a petition for a writ of certiorari. *Powers* v. *Springfield City Council*, 116 Mass. 84. *Dwight* v. *Springfield City Council*, 4 Gray, 107. We are therefore of opinion that after the report was filed she had a right to come into court and present objections to the confirmation of the report, and be heard

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upon them, as she might have filed a petition for a writ of certiorari if the taking had been by county commissioners.

The other question is whether the court has power to revise the action of the commissioners in this particular. Their decision cannot become effective unless it is confirmed by the court. The statute implies that the court will consider the question whether it should be confirmed. It implies that the court will not confirm it if errors of law are apparent in it. If the court has reason to suspect that the report is founded on an error of law it may inquire into the matter, and take testimony if necessary, to ascertain whether the suspicion is well founded. If by reason of a suggestion of one of the parties, or for any other cause, there is reason to believe that the report is founded on an important mistake of fact, or if there seems to have been an irregularity in the proceedings which has affected the report the court may properly recommit it that the error may be corrected. In case of misconduct of the commissioners, or gross error, or refusal to regard the direction of the court to correct an error of law, we have no doubt of the power of the court to reject the report, revoke their appointment, and appoint other commissioners. On the other hand, the commissioners constitute a tribunal which is finally to decide the matters of fact on which alone the abolition of a grade crossing can be ordered. *Commonwealth* v. *Westborough*, 3 Mass. 406. *Kingman* v. *County Commissioners*, 6 Cush. 306. *Thorpe* v. *County Commissioners*, 9 Gray, 57. The court has no power to revise their report and order a change to be made otherwise than as they finally recommend. So long as they keep within the authority conferred by the statute to act under the petition, and in the proceedings which determine their jurisdiction, the court has no power to substitute its opinion for theirs. In *Norwood* v. *New York & New England Railroad*, 161 Mass. 259, this court has held that, upon the facts before the Superior Court, on which presumably the decision of that court was founded, there was error of law in the construction of the statute. It has never been intimated that in a case of this kind the court can take the report of the commissioners, and, on hearing evidence, amend it into a new report, and order a change of a crossing to be made in a mode different from that adopted by the commissioners.

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In the present case it does not appear that the action of the commissioners was outside of the jurisdiction conferred by their appointment under the statute, or that they erred in any matter of law, and it does appear that they fully heard and considered the questions presented to the Superior Court by the petitioner Lefstrom. The question whether a few feet more or less of land should be taken at a particular point, for the convenient construction of the work, was one which the Legislature intended to submit to their decision.

We are of opinion that the matters which the petitioner Lefstrom offered to prove related to facts passed upon by the commissioners in regard to which, in the absence of irregularity of procedure or gross error, their decision was final, and that therefore upon these offers of proof the court has no power to revise their action. *Petition dismissed.*

JOHN CARR *vs.* WEST END STREET RAILWAY COMPANY.

Middlesex. January 22, 1895. — April 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Evidence as to Habits.

At the trial of an action for personal injuries occasioned to the plaintiff, and for damages caused to his horses and wagon, by collision with the defendant's street car, testimony as to the plaintiff's habits is not admissible to contradict evidence that he was intoxicated at the time of the accident, nor is it admissible to meet the testimony brought out by the plaintiff on cross-examination of a witness for the defendant that the plaintiff had been seen intoxicated several times before the accident, as, the latter testimony being immaterial, the plaintiff was not entitled to contradict it.

TORT, for personal injuries occasioned to the plaintiff, and for damages caused to his horses and wagon, by collision with a street car of the defendant. At the trial in the Superior Court, before *Mason*, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, in substance as follows.

The defendant introduced evidence tending to show that the plaintiff was at the time of the collision under the influence of liquor, and that his condition contributed not only to the acci-

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dent, but to the extent of the injury which he claimed to have received therefrom.

One Story, who was conductor of the car and who had been in the employ of the defendant for fourteen years, testified for the defendant that he saw the plaintiff approaching, and watched him; that he acted stupid; that as he raised him up from the street, and when he was assisting him inside, he could smell his breath; and that after the plaintiff sat down in a chair the witness made the remark that the man was intoxicated.

On cross-examination, the same witness testified that he had his eye on the plaintiff because he had seen him intoxicated several times before on the street while on his wagon, and that he had seen him intoxicated while on his wagon since the accident.

In rebuttal, the plaintiff called one Hursch, who testified that he had known the plaintiff as a carter of brick for twenty years, and that he had employed him for nearly eighteen years.

"*Q.* Did you ever see Mr. Carr intoxicated? *A.* Never. He was a very sober, industrious man, very reliable. Never knew him to be under the influence of liquor."

To this question and answer the defendant objected, but the judge allowed them; and the defendant excepted.

"*Q.* Now, will you state more particularly as to his habits as to drink? *A.* I never knew that he drank a drop in my life. Never knew him to. He may have drunk, but I never knew him to."

This question and answer were also objected to by the defendant, but the judge allowed them; and the defendant excepted.

W. B. Sprout, for the defendant.

M. P. Beckett, for the plaintiff.

HOLMES, J. The testimony as to the plaintiff's habits was not admissible to contradict the evidence that he was intoxicated at the time of the accident. Neither was it admissible to meet the testimony brought out by the plaintiff on cross-examination, that he had been seen intoxicated several times before the accident. The latter testimony was immaterial, and the plaintiff was not entitled to contradict it. *McCarty* v. *Leary*, 118 Mass. 509. *Shurtleff* v. *Parker*, 130 Mass. 293, 297. *Lamagdelaine* v. *Tremblay*, 162 Mass. 339. *Alexander* v. *Kaiser*, 149 Mass. 321. *Harrington* v. *Lincoln*, 2 Gray, 133.

Exceptions sustained.

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WILLIAM J. ATWELL *vs.* EDWARD J. JENKINS.

Suffolk. January 24, 1895. — April 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Contract — Privity — Action — Insanity of one Party — Right of other Party to avoid Contract.

A., an inhabitant of another State, committed an offence here, and was arrested. He retained B., an attorney at law, and telegraphed to C. as follows: "Telegraph at once four hundred dollars to B., my attorney. . . . Am in trouble. Don't fail." C. thereupon sent the money to B., who then recognized as surety for A., and obtained his release from arrest. Afterwards a *nolle prosequi* was entered by reason of A.'s insanity. *Held*, that there was no contract between C. and B. upon which to found an action for the recovery of the money.

The insanity of one contracting party does not give to the other the right to avoid the contract.

HOLMES, J. This is an action to recover four hundred dollars, put into the defendant's hands by the plaintiff through the Western Union Telegraph Company, under the following circumstances. One Hoes, an inhabitant of Chicago, committed an offence here and was arrested. It seems to have been for his interest to keep the matter private. He retained the defendant, who, on receipt of the above mentioned money, recognized as surety for him and obtained his release from arrest. Afterwards a *nolle prosequi* was entered by reason of the insanity of Hoes. When arrested, Hoes telegraphed to the plaintiff, "Telegraph at once four hundred dollars to Hon. Edward J. Jenkins, my attorney. . . . Am in trouble. Don't fail." The plaintiff thereupon sent the money.

It hardly needs to be said that this transaction made no contract between the plaintiff and the defendant. The plaintiff's advance was to Hoes. When the money was received by Jenkins, it was received by Hoes as between them and the plaintiff, and if the defendant kept it, that was by some arrangement between him and Hoes with which the plaintiff had nothing to do.

But there was evidence that Hoes was insane at the time, and the plaintiff claims a right to recover on that ground. This

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must mean that he had a right to avoid his contract on the ground of the other party's insanity, and to demand his money wherever he could find it, unless the defendant, to whose hands it was traced, stood as a purchaser for value, or had changed his position, which fact the plaintiff had a right to deny, and did controvert in this case, except as to fifty or sixty dollars. We presume that the argument is, that if Hoes had become sane and had affirmed his dealings with the defendant, the plaintiff still would have had the right to prove that the defendant had no contract with Hoes, and was not a purchaser for value, and that, on the other hand, if Hoes had avoided his contract, his right to the money would be subject to the plaintiff's paramount right to the same fund, always supposing that the plaintiff had the right to avoid his contract also. *Buller* v. *Harrison*, Cowp. 565, 568. *Cox* v. *Prentice*, 3 M. & S. 344.

But the question is whether the plaintiff had the right supposed. In *Holt* v. *Ward Clarencieux*, Strange, 937, it was held, on great consideration, that a person of full age contracting with an infant was bound absolutely, although the infant had a right to avoid her contract. The decision was on demurrer to a plea of the plaintiff's infancy, not alleging that the defendant was ignorant of the fact when he made the contract, but seems to have been made without regard to whether the defendant knew or not. This case is accepted without dispute as the law. *Thompson* v. *Hamilton*, 12 Pick. 425, 429. *Warwick* v. *Bruce*, 2 M. & S. 205. *Bruce* v. *Warwick*, 6 Taunt. 118. *Monaghan* v. *Agricultural Ins. Co.* 53 Mich. 238, 243. *Hunt* v. *Peake*, 5 Cowen, 475. *Cannon* v. *Alsbury*, 1 A. K. Marsh. 76. *Johnson* v. *Rockwell*, 12 Ind. 76, 81. *Field* v. *Herrick*, 101 Ill. 110. 2 Kent, Com. 78, 236. Leake, Con. (3d ed.) 476. The analogy between insane persons and infants is not perfect, but has prevailed in this matter. *Allen* v. *Berryhill*, 27 Iowa, 534. *Harmon* v. *Harmon*, 51 Fed. Rep. 113. Bish. Con. § 973. Clark, Con. 268. An insane person like Hoes, if he was insane, not a raving madman or an idiot, is capable of an act, even if his act be voidable. The promise of an insane man is not absolutely void. *Carrier* v. *Sears*, 4 Allen, 336, 337. *Bullard* v. *Moor*, 158 Mass. 418, 424. So that it cannot be argued that the contract was formally defective and void be-

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cause only one party had done the necessary overt act. A voidable promise is a sufficient consideration. *Plympton* v. *Dunn*, 148 Mass. 523, 527. If a person unwittingly dealing with an insane man were given the right to avoid his contract when he found out the fact, it would be on grounds of policy and fairness, and of course it would be possible to read in a condition or personal exception to that effect. But there seems to be no more reason to do it in this case than when a man has contracted with an infant. The general rule is that a man takes the risk of facts which he deems material, unless he expressly stipulates for them in his contract, or unless he is misled by a fraudulent misrepresentation. See *Ring* v. *Phœnix Assurance Co.* 145 Mass. 426, 429. The right to avoid is for the personal protection of the insane, and those who deal with them have been held to have no corresponding rights in all the cases which we have seen. Upon these considerations, and in view of the decisions cited, we are of opinion that the plaintiff cannot repudiate his contract with Hoes. So long as that contract stands, at least, he cannot maintain an action against the defendant. Other defences need not be considered. We express no opinion as to the law in case of a bilateral contract wholly unexecuted on both sides. *Exceptions overruled.*

C. W. Clark, for the plaintiff.

P. J. Casey, for the defendant.

JOHN J. SHEA *vs.* ARTHUR J. WELLINGTON.

Essex. January 25, 1895. — April 2, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Duty to inspect Appliance — Employers' Liability Act — Negligence.

In an action for personal injuries occasioned to the plaintiff, while engaged in blasting in the defendant's quarry, by an explosion of dynamite in a drill-hole which he was loading, it appeared that the method of blasting was to insert in the hole a dynamite cartridge and an "exploder," which was made of a copper covering filled with fulminate of mercury and discharged by electricity; that there

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are several kinds of exploders in general use; that the kind used by the defendant was as good as any made; that the manufacturer of them made from six thousand to eight thousand a day, packed them in boxes containing fifty each, and sold them in the open market ready for use; and that the making of exploders is a business in itself requiring skill, technical knowledge, and special machinery and appliances, and they are never made by quarrymen. The plaintiff testified that one of the exploders furnished him on the day of the accident had a seam through which the mercury could be seen. The manufacturer of them testified, and his testimony was uncontradicted, that he never saw one with a seam in it; that they were tested several times in the process of manufacture; that, when completed, they were dipped in melted wax at a certain heat, which left a glazing of wax over the whole exploder; and that, if there was a seam in an exploder when it was dipped in wax, it would explode. The defendant's superintendent testified that he had used this kind of exploder for years and never saw one with a seam in it, or one which exposed the mercury. There was no evidence tending to show that up to the time of the accident an exploder of this kind with a seam in it, or with any other defect of construction, had ever been discovered by anybody. *Held*, that there was no duty on the defendant's part to inspect the exploders as to their construction before they were used.

An exploder made of a copper covering filled with fulminate of mercury and discharged by electricity, which is bought by the owner of a quarry to be used and instantly consumed in producing an explosion for the purpose of blasting rock, is not a part of his "ways, works, or machinery," within St. 1887, c. 270, § 1, cl. 1.

An employer is not liable, under St. 1887, c. 270, § 1, cl. 2, for the negligence of his superintendent in furnishing an employee with a defective appliance, if the employer owes no duty to his employee to have the appliance inspected in regard to its construction before use, and if it is no part of the superintendent's business to make such inspection, unless he assumes so to do, with his employer's knowledge and consent, as a part of the work which, as superintendent, he is employed to do.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ. The declaration contained three counts, the first at common law, and the second and third under the employers' liability act, St. 1887, c. 270, § 1, cls. 1, 2. Trial in the Superior Court, before *Sherman*, J., who, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

W. H. Moody, for the plaintiff.

H. E. Bolles & C. A. Cushman, for the defendant.

KNOWLTON, J. The plaintiff, while blasting in a quarry, was injured by an explosion of dynamite in a drill-hole which he was loading. The method of blasting was to insert in the hole a dynamite cartridge, and an exploder which was discharged by

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electricity. The exploders used were the kind known as the Victor. They are thin copper plates or shells about one and a half inches long, and one third of an inch in diameter. These caps or shells are made or "swaged" by machinery out of an entire piece of thin copper plate, and are pressed in a die into the form of a seamless cap, closed at one end and open at the other. The tube or cap is subsequently nearly filled with fulminate of mercury. Into and through the open end run the ends of two small wires several feet in length. These two wires are connected within the exploder by a very fine platinum wire. After the insertion of the wires the open end of the cap is filled with a preparation of sulphur. The fulminate of mercury is white or cream-white in color, and is very explosive. The object of the exploder is to explode the dynamite. The exploder is discharged by an electric current sent through the two wires. There are several kinds of exploders in general use: some are made to fire with a fuse; some are not pressed or swaged out of a single piece of copper in such a way as to be seamless, but the copper is made into a tube formed by rolling and lapping one edge over the other so as to make a joint the length of the tube. There was evidence "that the manufacturers of the Victor exploder were the second largest manufacturers of exploders in this country, and made six to eight thousand a day." The Victor exploders are as good as any made, and the plaintiff did not contend that the defendant was negligent in using this kind of exploder. They are packed by the manufacturers in boxes containing fifty exploders, and are thus sold in the open market, ready for use. The defendant bought the Victor exploders in the open market, sold them to others, and used them in his own quarry. The making of exploders is a business in itself, requiring skill and technical knowledge, and special machinery and appliances. They are never made by quarrymen. All the foregoing facts were not disputed.

The plaintiff testified that on the day of the accident he got from the defendant's superintendent seven exploders to be used in loading seven holes drilled in the ledge, and that the superintendent, as he took them out of the box, passed each of them from one hand to the other and looked at them, and "when he came to the fourth or fifth he picked at it with his finger-

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nail" and said, "I guess that is all right." The plaintiff also testified that he saw there was a seam in the copper, perhaps half an inch long lengthwise of the exploder, through which he saw a white substance. The defendant's superintendent denied that he got the exploders for the plaintiff, or saw them, and testified that the plaintiff took the key and got them himself. There was no corroboration of the plaintiff's testimony in this part of the case, but there was other evidence that, if there was then a seam in the exploder through which the fulminate of mercury could be seen, and if the plaintiff used it as he said he did, it would adequately account for the accident. There was testimony from other witnesses, who were uncontradicted except by the plaintiff, tending to show that the accident was caused by the plaintiff's using a hammer in pounding upon the end of a stick or drill in the hole where the dynamite was.

If we assume that there was a seam in the exploder through which a white substance could be seen, the first question is whether there was evidence of negligence on the part of the defendant in failing to have the exploders inspected after he bought them and before they were used. It is conceded that he did the best that could be done to procure exploders that were safe, unless it was his duty to inspect them one by one at the quarry in reference to their qualities and mode of construction. The precise question now to be determined is whether there was any evidence which would warrant the jury in finding that the defendant ought to have made such an inspection. It is obvious that an inspection could not effectively be made unless a skilled expert was employed, possessed of the mechanical and chemical knowledge involved in the manufacture of them. Upon the admitted facts these articles are manufactured with a view to rendering such inspection unnecessary. They are composed of very dangerous chemicals. They are put up in boxes to be sold in the market and to be used by quarrymen as they are purchased. The persons into whose hands they are intended to go when sold would not be competent to inspect them. They are admitted to be the best of their kind. The plaintiff, who had previously had six or seven years' experience in quarrying, including blasting, testified that he "never saw any trouble with any other exploder" than the one to which

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he imputed his injury. The plaintiff called experts, some of whom had seen seams in exploders constructed with a seam, but no one of whom ever saw an exploder with a seam in it exposing the mercury, or ever saw an exploder of this kind of construction with any seam at all in it. These experts testified that they never looked for seams in exploders and never thought it necessary, and their uncontradicted testimony was that they used them just as they came. There was no evidence from anybody that a defect in one was ever discovered, unless there was a defect in one of those used on the day of the accident. If there was anything unusual in the appearance of the exploders, it would be almost certain to attract the attention of a person about to use it in loading a hole, and from his experience in blasting he would be more likely to know whether it was dangerous than a person employed as an inspector, unless that person was an expert in the manufacture of exploders.

The manufacturer testified, and there was no evidence tending to contradict his testimony, that for six years he had manufactured from six thousand to eight thousand of these exploders per day, and that he never saw one with a seam in it. He said that the exploders were tested several times in the process of manufacture, that when completed they were dipped in melted wax at a heat of 250° Fahrenheit, which leaves a glazing of wax over the whole exploder, and that if there was a seam in an exploder when it was dipped in wax it would explode. Watson, the defendant's superintendent, testified that he had used this kind of exploders for years, and never saw one with a seam in it, or one which exposed the mercury. There was no evidence in the case tending to show that up to the time of the accident an exploder of this kind with a seam in it, or with any other defect of construction, had ever been discovered by anybody. The uncontradicted testimony in regard to the mode of constructing them and preparing them for the market indicates that it would be almost impossible for an exploder with such a defect in it to be produced by the processes of construction used, and to pass repeated inspections and be put into the boxes and sent to the market. Judging the defendant's conduct by the facts which he knew or ought to have known before the accident, we find nothing to indicate that he

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had any duty to inspect these exploders as to their construction before they were used. It would be unreasonable to hold upon these facts, or upon any evidence in this case when considered in connection with the admitted facts, that quarrymen using these exploders owed their employees a duty to have them inspected by a competent person as to the mode and workmanship of their construction.

The case is very different from *Moynihan* v. *Hills Co.* 146 Mass. 586, and others of that class. The general principles stated in that case, when applied to facts like these, do not call for an inspection by an employer to see whether there are defects like that testified to by the plaintiff. The defendant had every reason to believe that the exploders were manufactured in such a way as to be safe to use. In view of the confidence which he might properly place in the manufacturers of such an article, which had been produced in such quantities and had been so long and so well known in the market, the effort required to make an inspection of them in regard to their construction and condition at the quarry where they were used, or to cause one to be made, would have been much greater than it would be reasonable to require. They were not a part of the machinery or tools of the defendant. They were articles to be used in his business which were instantly consumed in use. It was his duty, so far as he could do it by reasonable effort, to see that none but safe and proper articles were furnished to his servants for such a use, but he was only called upon to do what was reasonable under the circumstances.

This case is somewhat analogous to *Garragan* v. *Fall River Iron Works*, 158 Mass. 596, in which it was held that an employer owes his employee no duty to inspect cotton bales on which an employee is working to see if the covering is strong enough safely to hold the hooks which are commonly used in moving such bales; but the analogy is not complete.

We are of opinion that the plaintiff cannot recover under the first count of his declaration, which alleges neglect of duty arising under the common law.

The second count alleges negligence of the defendant in regard to his ways, works, or machinery. Under this count there can be no recovery, because the exploder was not a part of the de-

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fendant's ways, works, or machinery, within the meaning of the law, but was only an article of merchandise which was bought to be used and instantly consumed in producing an explosion. *Lynch* v. *Allyn*, 160 Mass. 248. *Burns* v. *Washburn*, 160 Mass. 457.

The third count alleges negligence of the defendant's superintendent in furnishing for the plaintiff's use a defective exploder. We have already seen that the defendant owed the plaintiff no duty to have the exploders inspected by his superintendent, or by anybody else, in regard to their construction. Unless there was evidence which would have warranted the jury in finding that inspecting the exploders for defects in construction was a part of the business of superintendence in which the superintendent was negligent, it is of no consequence in this case whether he did or did not act carelessly in picking with his nail at the exploder, and then passing it to the plaintiff to be used, as the plaintiff testifies he did. There is evidence that he was the general superintendent at the works. Doubtless the general custody of the exploders and of all the other property there was involved in his superintendence, but is there any evidence that an inspection of them for defects in construction was a part of the duty which, as a superintendent, he was hired to perform? The admitted facts and undisputed evidence to which we have already referred make it almost certain that he was never hired to do such a duty. In order to hold an employer for positive acts of negligence on the part of his superintendent, if these facts relate to a matter in regard to which the employer has no duty to perform, it should be made clearly to appear that the employer has undertaken to do by his superintendent that which he was not called upon to do. An act done voluntarily by the superintendent in that field, without the direction or approval of the employer, would not be an act of superintendence. *Fitzgerald* v. *Boston & Albany Railroad*, 156 Mass. 293. *Cashman* v. *Chase*, 156 Mass. 342. The superintendent testified that on the day of the accident the plaintiff went to the cupboard, "unlocked it with the key that always hung there, took what exploders he wanted as usual, and returned to the ledge." Speaking of the exploders, he also testified that "Shea never brought them to him for inspection." The plaintiff testified that on the day of the accident the superintendent took the

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seven exploders, passed each from one hand to the other, and looked at them. He also testified, in direct examination, that when he got the exploders from the cupboard himself, he always showed them to Watson before using them, and he inspected them. But in cross-examination he testified that he never took the dynamite to Watson for inspection. He also said, "Sometimes Mr. Watson would get the exploders, but most of the time I would get the key from him and go to the engine-house, unlock the cupboard, and take the exploders from the box myself. I took them up as they came, — never selected them. . . . I never saw any trouble with any other exploder." Although there is language in the plaintiff's direct examination indicating that Watson was accustomed to look at the exploders, there is very little even in that to indicate that he was inspecting them in regard to their construction, or doing more than to look to see how many were used. But the effect of this is almost, if not entirely, taken away by the plaintiff's later testimony in cross-examination, which fairly implies that he was accustomed to get the key and take these exploders, and use them without inspection. Taking the testimony together, there is hardly more than a scintilla of evidence that Watson ever assumed to inspect these exploders to see whether they were safely and properly made. But if Watson assumed to do that, it being no part of the defendant's business to do it or to have it done, it cannot affect the defendant unless it appears that it was done with the defendant's knowledge and consent, as a part of the work which, as superintendent, he was employed to do. There was no testimony that the defendant ever hired him to do it, or knew that he assumed to do it. If he saw the seam in the exploder, and if the jury might have found that as a prudent man he ought to have thought the exploder unfit for use by reason of the seam, his negligence in failing to say so to the plaintiff was only the negligence of a fellow servant, for which the defendant is not liable. There is no evidence that the determination of the question whether an exploder was unsafe by reason of an apparent defect in construction was within the scope of his employment as superintendent. He was not selected in reference to his qualifications to decide such a question. If he noticed a seeming defect in the mode of construction of an article which

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he was not expected to examine, and whose workmanship was outside of the field of his superintendence, his duty to speak of it to the plaintiff was no greater than that of any other workman of equal knowledge and experience who might have seen it. If he was guilty of negligence in that particular, his negligence was that of an ordinary employee, and not that of a superintendent. We are of opinion that the jury would not have been warranted in finding that the plaintiff suffered from any negligent act on the part of Watson done in that part of the work in which he was employed to exercise superintendence.

If there was a mere scintilla of evidence in favor of the plaintiff on this point, it was not enough to warrant the jury in finding a verdict for him. *Hillyer* v. *Dickinson*, 154 Mass. 502.

Exceptions overruled.

COMMONWEALTH *vs.* HANNAH WELCH.

Middlesex. March 6, 1895. — April 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Evidence.

At the trial of a complaint for keeping and maintaining a liquor nuisance there was evidence that men had been seen going into a side door in the defendant's house, some of them coming out under the influence of liquor, and that from this side door there was a path to a side door in another house, in a room of which, locked with a brass padlock, was found whiskey, and a key fitting the padlock was in the defendant's house. On the same day the defendant's daughter, who was about seventeen years old and lived with her, after looking up and down the street in front of the houses, went from the defendant's side door to the other several times, in a loose dress, and returned holding her dress as if she had something under it. An officer seized the object from the outside, and found it a hard substance like a quart bottle, and the defendant ordered the officer to let the girl go, the officer saying, "Let me see what that is," and the defendant answering, "No, I won't." *Held*, that the evidence was admissible in connection with the other facts, and that the mode in which the officer got his knowledge of what the girl had in her hand did not make the fact inadmissible.

COMPLAINT, charging the defendant with keeping and maintaining a liquor nuisance in Cambridge, between August 1, 1892, and February 23, 1893. At the trial, in the Superior

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Court, before *Lilley*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions. The facts appear in the opinion.

T. J. Gargan & P. J. Casey, for the defendant.

F. N. Wier, District Attorney, for the Commonwealth.

HOLMES, J. There was evidence that many men had been seen going into a side door in the ell of the defendant's house, and that some of them were under the influence of liquor when they came out. From this side door there was a path to a side door in the ell of another house. In this ell was a room locked with a brass padlock, and in the room on February 19, 1893, was a three-gallon jug nearly full of whiskey. A key fitting the padlock was in the defendant's house. Exceptions were taken to the admission of evidence that on the same day the defendant's daughter, a girl sixteen or seventeen years old, who lived with her, after looking up and down the street in front of the houses, was seen to go from the defendant's side door to the other several times, in a loose dress, and to return holding her dress as if she had something under it; that an officer seized this object from the outside of the dress, and found it a hard substance, in size and shape like a quart bottle; that the defendant was present and ordered the officer to let the girl go; that he said, "Let me see what that is"; and that the defendant answered, "No, I won't." The defendant's answer may have been dictated by other reasons, but the jury were at liberty to find that it was due to unwillingness on her own account to let the officer know what the object like a bottle was. The evidence was admissible in connection with the other facts. See *Commonwealth* v. *Vahey*, 151 Mass. 57; *Commonwealth* v. *Hyland*, 155 Mass. 7. The mode in which the officer got his knowledge of what the girl had in her hand did not make the fact inadmissible. *Commonwealth* v. *Brelsford*, 161 Mass. 61.

Exceptions overruled.

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SUPREME COMMANDERY OF THE UNITED ORDER OF THE GOLDEN CROSS *vs.* SPENCER R. MERRICK, administrator, & others.

Suffolk. March 7, 1895. — April 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Fraternal Order — Benefit Certificate — Interpleader — Foreign Law.

A fraternal order, which, upon the surrender of a benefit certificate issued by it to a member, issues to him in its place another certificate promising to pay a certain sum upon his death to a different person from the one named in the first certificate, may maintain a bill of interpleader against both beneficiaries and the administrator of the deceased member's estate to have it determined to whom the fund shall be paid; and it is immaterial that the beneficiary named in the second certificate has paid the assessments and dues of the member since a certain date.

HOLMES, J. This is a bill of interpleader brought by a fraternal order to have it determined to whom shall be paid a fund due under a benefit certificate issued to a member now deceased. It is stated in the bill that before the issue of the present certificate another one had been held by the member Clementine N. Towne, in which one Nye and others, brothers and sisters of the member and her next of kin, were named as beneficiaries, but that that certificate was surrendered and the present one issued in its place. The beneficiaries named in the present certificate are Joseph W. and Emma I. Chase. The prayer of the bill is that the first named beneficiaries as beneficiaries and next of kin, the second named beneficiaries, and the administrator of the member, may interplead. The Chases demur.

There is nothing in the plaintiff's position to prevent it from maintaining the bill. It has issued two certificates, it is true, by which it promised the member to pay the fund to different persons. But so far as its relation to the member's administrator is concerned, there is no possibility of its finding itself improvidently committed to two contracts. The second certificate binds it only in case the second certificate is effectually substituted for the first, and the first certificate stands unless the beneficiaries named in the second are persons competent to take. *Elsey* v. *Odd Fel-*

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lows' Relief Association, 142 Mass. 224, 226. Both certificates, although in form different contracts in that they name different payees, concern the same obligation to pay two thousand dollars, and the obligation would not be void if the only attempted nomination of beneficiaries was invalid. *Rindge* v. *New England Aid Society*, 146 Mass. 286, 288.

There is no ground for objecting to the bill in the relation of the plaintiff to the beneficiaries. Apart from statute, they are strangers to the contract. The plaintiff does not stand as having attorned successively to the two sets of beneficiaries, as in the case of a bailee who either after a sale or in advance agrees to hold for the purchasers of goods in his possession. It has not issued two independent life policies to the two sets of defendants, as seemed possible in *National Ins. Co.* v. *Pingrey*, 141 Mass. 411, 414. Compare *Pingrey* v. *National Ins. Co.* 144 Mass. 374, 383. Apart from statute and the laws of the company, a member in naming or changing a beneficiary simply exercises an equitable right to declare a revocable trust in favor of any one he chooses in respect of a sum of money which the plaintiff has promised to pay. The *cestuis que trust*, if they can be said to have a right during the life of the member, claim only through him, and have no immediate relation with the company. The laws of the company, so far as they recognize this right of the member, are only declaratory, and neither they nor the certificate naming the beneficiaries make a subsidiary contract with the latter. If a statute creates a direct obligation between the company and the beneficiaries, it is not to be taken to affect the terms of liability. It regulates procedure and enforces the company's authority to discharge itself by paying them. It may give them a lien on the company's funds, but the conditions on which they are entitled to claim as beneficiaries are not touched. The company still owes but one sum, and is left indifferent between the claimants, being subject to but one liability, although it may be in doubt, on grounds of fact or law, or both, to whom it ought to pay. In the case at bar, so far as appears, the plaintiff had no notice that the second beneficiaries were not dependents, or otherwise legally named, even if they were not; and so far as it knew, the member was doing no more than she was entitled to do. The case is not affected by the allegation

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that the Chases have paid the assessments and dues of the member since a certain date. The payments were made on behalf of the member, and under her contract with the company. They preserved the liability of the company to pay as the member lawfully might direct, but made no new contract and imposed no new liability. See *Shea* v. *Massachusetts Benefit Association*, 160 Mass. 289, 291; *Ætna Ins. Co.* v. *France*, 94 U. S. 561, 564.

The ground on which the demurrer is pressed is, that it is apparent on the face of the bill that the Chases are entitled to the money. If they be so, it would seem more for their advantage to give them a decree in this case, than simply to dismiss the bill, and leave them to an action at law if the company does not pay of its own free will. The remedy by interpleader is so beneficial, has been resorted to so commonly in cases of this sort, and the somewhat analogous but not identical jurisdiction under bills for instructions by trustees has been carried so far in this Commonwealth, that we are disposed to resolve any doubts in favor of the plaintiff. In this case there are some elements left uncertain by the bill. It is true that the charter of the plaintiff provides that the sum is to be paid to the member's family "or to be disposed of as he or she may direct," and that the laws of the corporation are not to be read as attempting to limit this absolute power of disposition. But the charter is granted under a general law of Tennessee, which is not before us, and which must be proved as a fact, so that if it be true, as contended on behalf of the Chases, that the validity of the designation of beneficiaries depends on the law of Tennessee alone, it cannot be decided at the present stage of the case. If either under the laws of Tennessee or by the statutes of Massachusetts it be necessary to decide whether the Chases were dependents or relatives or members of the family of the deceased, these facts do not appear.

Demurrer overruled.

W. H. Powers, for the plaintiff.

G. L. Mayberry, for the defendants.

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FRANK E. ROBINSON *vs.* JOSEPH H. CUTTER.

Suffolk. March 15, 1895. — April 2, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Contract — Evidence — Notice to produce — Witness — Discretion of Judge — Frivolous Exceptions — Double Costs.

At the trial of an action for breach of a contract, the defendant having put in evidence what purported to be a letter to himself signed by the plaintiff, and having asserted that this was all of the letter which he received at the time, though at other times he had received other letters from the plaintiff, the judge allowed the plaintiff to show that the paper produced did not contain the whole of the letter as written, and that something material had been cut off from the top. *Held*, that the evidence was competent, and that it was not necessary for the plaintiff to give notice to produce other letters.

At the trial of an action in the Superior Court, the judge may properly allow the plaintiff to testify that, at the former trial of the case in the Municipal Court, a witness, who was also a witness at the trial in the Superior Court, was present of his own accord, and without a request from the plaintiff.

CONTRACT, to recover damages for breach of an agreement to hire the plaintiff as a carriage wood-worker. Trial in the Superior Court, before *Sheldon*, J., who, after a verdict for the plaintiff, allowed a bill of exceptions, in substance as follows.

It was admitted that the plaintiff had worked a few weeks under the written contract, which was that the defendant agreed to pay the plaintiff, "for services which he may render as a carriage wood-worker, the amount of thirty cents for each and every hour, with full time for one year" from its date, July 6, 1891; and that subsequently the plaintiff had been laid off, the defendant agreeing to make good any loss of wages.

The defendant introduced evidence to show that he had sent for the plaintiff to come to work for him, but that the plaintiff had refused to go to work, and had subsequently left at the house of the defendant a letter as follows: "As it now stands, I think it would be better for me to remain where I am, so send you word to save you sending a team after tools. Hoping you will lose nothing by waiting this length of time, I remain yours respectfully, F. E. Robinson."

The defendant testified that this was all of the letter which

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he had received at that time, but that there were other letters written by the plaintiff to him.

The plaintiff denied writing or sending the letter at this time, while he admitted that he at some time had written and sent it.

In rebuttal, he introduced evidence to prove that the letter was part of a letter which had been written and deposited in the mail with postage prepaid, enclosed in an envelope addressed to the defendant on July 2, 1891, four days previous to the date of the contract in evidence; that the letter was a part of the original negotiations which led up to the contract of July 6, 1891, and that upon the evening of the same day upon which the letter was sent, the defendant called upon him, and said: "I received your letter; I cannot put up the fifty dollars, but I will give you a contract in writing for a year"; to which the plaintiff assented, and which finally resulted in the contract declared upon.

One Blood testified that he was a schoolmaster, and brother in law of the plaintiff; that in the latter days of June and early days of July, 1891, he was making his home with his sister at the house of the plaintiff; that he was present at the time the letter in question was written; that he could not remember whether he read it or it was read to him, but that he remembered distinctly to have seen the sheet of paper upon which the letter was written; that it was a full half-sheet, and might have been a double sheet; that he remembered distinctly that it began with a date and address, and that the paper produced by the defendant appeared to be part of this letter, but was not the whole of it; that apparently a part of it had been cut away, and that he could see one or two marks at the top of the letter produced which looked to him like the loops of letters belonging to words which had been written upon a line above, and subsequently cut off.

The plaintiff then offered oral evidence of the contents of the whole of that letter, no notice having been given, and no demand having been made at the time of the trial, to produce the original letter.

Alice W. Robinson, the wife of the plaintiff, testified that she was present when the plaintiff, on July 2, 1891, at his house,

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wrote to the defendant the letter referred to; that she read it, and knew its contents; that the paper produced by the defendant was not the whole of the letter written; that she could see one or two marks on the part produced which looked like loops from words which had been written on a line above the words written upon the paper produced; that the paper upon which her husband had written said letter was a longer sheet, and that it appeared that a portion of said paper and the writing had been cut off. She was then asked to state what the contents of the letter were. The counsel for the defendant objected, but his objection was overruled, and he excepted. The witness testified from memory that she knew that the letter was dated, that it read, "Joseph H. Cutter, — Dear Sir: If you will deposit $50, to be forfeited in case you break your agreement to give me work, then I might talk with you"; that he stated too that one Henderson had offered to raise his pay after a certain date; that she was not positive when, but she thought January 1; and that he was sure of steady work there. And he said, "As things now stand, I think it would be better for me to remain where I am," etc.

The plaintiff, in rebuttal, stated that the letter in question was written on July 2, 1891. He further testified, in substance, as Alice W. Robinson and Blood had testified, and under the same objection gave his testimony, to which the previous exception applied, as follows: "I said in this letter to Mr. Cutter, that if he would deposit $50 in the bank, to be forfeited in case he failed to keep his agreement with me, I would talk with him farther, and then went on and wrote this which has been offered here: 'As things now stand,' or 'As it now is,' as it reads here."

The case was first tried in the Municipal Court of the City of Boston. It appeared at the trial in the Superior Court, that Blood was present and testified regarding the letter in question, but that the plaintiff's wife was not present, and did not testify at the trial in the lower court.

The plaintiff was asked to state to the jury how it happened that his wife was not present at the trial in the lower court. To this question the defendant objected. The purpose of the plaintiff's counsel in having the question put was to enable him

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to argue to the jury that the reason for the absence of Mrs. Robinson at the trial in the lower court was, that the plaintiff had no expectation that the letter in question would be in evidence, nor that the defendant would contend that it was written at any time subsequent to the date of the contract. The judge ruled that that argument would be open to the plaintiff as well without putting the question, and excluded the question. The plaintiff was then asked, "How did it happen that Mr. Blood was there?" — meaning at the trial in the lower court. The counsel for the defendant objected, his objection was overruled, and he asked the judge for an exception. The judge refused to grant an exception, on the ground that it was a matter of his discretion as to the extent to which collateral matters and incidental matters could be gone into. The judge did allow an exception to the refusal to grant an exception to the previous question. The answer to the question was, "He came in for the fun of it, to hear the last half of the trial; he was not present during the whole trial, and I had not asked him to be there."

N. F. Hesseltine, for the defendant.

W. M. Noble, for the plaintiff, was not called upon.

ALLEN, J. The defendant having put in evidence what purported to be a letter to himself, signed by the plaintiff, and having asserted that this was all of the letter which he received at that time, though at other times he had received other letters from the plaintiff, it was proper for the court to allow the plaintiff to show that the paper produced did not contain the whole of the letter as written, and that something material had been cut off from the top. In was not necessary for the plaintiff to give notice to produce other letters.

The court might properly allow the plaintiff to testify that at the former trial of the case in the Municipal Court the witness Blood was present of his own accord, and without a request from the plaintiff.

The plaintiff moves for double costs on the ground that the defendant's exceptions are frivolous. This motion is granted.

Exceptions overruled, with double costs.

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NELLIE E. FITCH *vs.* CHARLES L. RANDALL & another, executors.

Suffolk. March 15, 1895. — April 2, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Contract to recover a Legacy — Answer — Instructions — Prima facie Case — Evidence as to Papers in the Probate Records.

In an action against the executor of a will to recover a legacy, an answer to the effect that administration was not completed, and that the condition of the estate would not permit the payment of the legacy, is informal, and contains no defence.

In an action against the executor of a will to recover a small legacy, proof by the plaintiff of the filing of an inventory by the defendant, showing assets of many thousand dollars, makes a *prima facie* case, without further proof that the debts were all paid and that assets remained in the hands of the executor.

In an action against the executor of a will to recover a legacy, even if the facts sought to be introduced by asking the register of probate to state the contents of certain papers which are among the probate records are competent in themselves, the proper mode of proving them is by putting in certified copies of the papers or records, or the papers or records themselves.

CONTRACT, against the executors of the will of Henry Randall, to recover a legacy. Writ dated July 11, 1893. The declaration alleged that the will was duly proved and allowed on November 23, 1891, and that on December 14, 1891, the executors gave bonds, which were approved by the Probate Court, and that the plaintiff had duly demanded payment of the legacy from the executors, who had neglected to pay the same. Answer: 1. A general denial. 2. That administration was not completed, and that the present condition of the estate would not permit the payment of the legacy. Trial in the Superior Court, before *Bond*, J., who directed the jury to return a verdict for the plaintiff for the amount of the legacy, with interest; and the defendants alleged exceptions.

G. C. Bent, for the defendants.

J. M. B. Churchill, for the plaintiff.

ALLEN, J. By Pub. Sts. c. 136, § 19, every legatee may recover his legacy in an action at common law. Unless otherwise provided in the will, legacies are payable in one year from the death of the testator. *Brooks* v. *Lynde*, 7 Allen, 64. *Rotch* v.

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Emerson, 105 Mass. 431. *Kent* v. *Dunham*, 106 Mass. 586. But when an executor or administrator is required to make payment within two years after having given bond, the Probate Court may require security for refunding the amount if necessary. Pub. Sts. c. 136, § 20. Formerly, when the plea of *plene administravit* was in use, the plaintiff could give in evidence the inventory, in order to prove assets; and then it was for the defendant to discharge himself of the items. Wms. Ex. (4th Am. ed.) 1781. 2 Greenl. Ev. §§ 347, 348. Taylor, Ev. § 860. Whart. Ev. § 1121. And now, when an answer is filed containing in substance the old plea, the rule is the same. *Cushing* v. *Field*, 9 Met. 180. *Fuller* v. *Connelly*, 142 Mass. 227. *Browne* v. *Doolittle*, 151 Mass. 595, 597. In the present case, the amended answer was informal, and contained no defence. But the ruling of the court did not rest on the defective pleading. It was in substance that the proof by the plaintiff of the filing of an inventory by the defendants, showing assets to the amount of over $36,000, made a *prima facie* case, without further proof that the debts were all paid and that assets remained in the hands of the executors. This ruling was right. The legacy was for only $250. It was incumbent on the defendants to clear themselves if they could.

The defendants sought to ask the register of probate to state the contents of several papers which were among the probate records. This was irregular. Even if the facts sought to be introduced were competent in themselves, the proper mode of proving them was by putting in certified copies of the papers or records, or the papers or records themselves, if they can be had; not by asking the register to state their contents. This was explained to counsel, as the ground of the exclusion, and he was informed that he might show by copies or original papers whatever he wished.

Moreover, all that the defendants offered to show, even in this irregular mode, fell short of showing that they had made any final accounting, or were without assets to meet the plaintiff's claim.* *Exceptions overruled.*

* The questions related to the amount of the personal property in the inventory of the special administrator and in the executors' accounts, the widow's allowance, and petitions for the sale of real estate for the payment

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NATIONAL REVERE BANK *vs.* FRANK W. MORSE & others.

Suffolk. December 10, 1894. — April 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Promissory Note taken as Collateral Security for pre-existing Debt — Action.

At the trial of an action upon a promissory note, the testimony of the defendant, who was the maker, was that he gave the note, which was made payable to his own order, to a broker at the broker's request, and under an agreement with him that he should not use it or negotiate it unless the defendant failed to keep his margin good upon stocks bought for him by the broker, or he became indebted to the broker, and not then unless the broker first notified him and gave him a chance to make his margin good or to pay such indebtedness. The broker pledged the note before maturity to the plaintiff, as collateral security for the payment of a pre-existing debt. *Held*, that the note was taken for value, but that, if it was fraudulently put into circulation, the burden was upon the plaintiff to show that it took the note for value before maturity and without notice or knowledge of the fraud.

BILL IN EQUITY, filed in the Superior Court, to recover of the defendant Morse the sum of twenty-five hundred dollars and interest, on a promissory note of his, payable to his own order, dated August 28, 1890, by him indorsed in blank and given to R. Gardner Chase and Company as collateral security, and transferred by them before maturity to the plaintiff by delivery; and to reach and apply in payment thereof the defendant Morse's interest in the estate of his father, Albert Morse.

At the trial in the Superior Court, before *Richardson*, J., the defendant Morse asked the judge to instruct the jury that, if they found the note in suit, or any note of which the note in suit was a renewal, was given for a previous indebtedness, and not for any loans made at the time said notes or either of them were deposited as collateral security with Chase and Company, the action could not be maintained. The judge refused so to rule, and also directed the jury, against the objection of the defendant Morse, to return a verdict for the plaintiff for the full

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of debts. The judge said, "You understand that you are not precluded from showing, by copies or original papers, whatever you wish," and the counsel replied, "I understand that."

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amount of the note and interest; and the defendant Morse alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in December, 1894, and afterwards was submitted on the briefs to all the judges.

W. B. Orcutt, for the defendant Morse.

C. T. Davis, for the plaintiff.

FIELD, C. J. This case cannot be distinguished from *Merchants' National Bank* v. *Haverhill Iron Works*, 159 Mass. 158. In that case the note was signed by the Haverhill Iron Works, payable to its own order and by it indorsed in blank, and the note was also indorsed in blank by the other defendants. The defence in that case, as appears by the original bill of exceptions, was that the note had been fraudulently put into circulation by the Potter-Lovell Company, and that the plaintiff did not take it for value and without notice of the fraud. The Haverhill Iron Works sent the note to the Potter-Lovell Company to be discounted by that company for the Iron Works, and the Potter-Lovell Company pledged the note to the plaintiff before its maturity as collateral security for the payment of a loan of money made by the plaintiff to the Potter-Lovell Company. In the case at bar the testimony of the defendant Morse was that he gave the note to R. Gardner Chase and Company at their request, and under an agreement with them that they should not use it or negotiate it unless he failed to keep his margin good or became indebted to them on account of stocks bought and sold by them for him, and not then unless they first notified him and gave him a chance to make his margin good or to pay such indebtedness, and that at all times he kept his margin good and never became indebted to them. On the defendant Morse's testimony, R. Gardner Chase and Company could not maintain an action against him on the note, because either the note was without consideration, or there had been a failure of consideration, or the note had been delivered to them to take effect on a contingency which never occurred. See *Burke* v. *Dulaney*, 153 U. S. 228. The main distinction between the defences set up in the two cases is, that in one case the Potter-Lovell Company pledged for its own debt a note sent to it to be discounted, and in the other R. Gardner Chase and Company pledged for their own debt a note left with them to be used

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only in a certain event which never happened. Both were cases where, on the testimony of the defendants, the note was fraudulently put into circulation.

In *Smith* v. *Livingston*, 111 Mass. 342, it is said: "Upon proof that a note is founded in illegality, or was obtained or put in circulation fraudulently, the burden of proof is upon the indorsee to show that he took it for value and in good faith before its maturity. *Sistermans* v. *Field*, 9 Gray, 331. *Tucker* v. *Morrill*, 1 Allen, 528. *Smith* v. *Edgeworth*, 3 Allen, 233. *Clark* v. *Thayer*, 105 Mass. 216." By note is of course meant negotiable promissory note. See *Easter* v. *Allen*, 8 Allen, 7; *Freeman's National Bank* v. *Savery*, 127 Mass. 75; *Lee* v. *Whitney*, 149 Mass. 447.

No distinction has been made in this Commonwealth, so far as the defence in this case is concerned, between obtaining a note by fraud and fraudulently putting it into circulation. Cases cited *ubi supra*. See *Joy* v. *Diefendorf*, 130 N. Y. 6; *Comstock* v. *Hier*, 73 N. Y. 269.

If the note was taken as collateral security for the payment of a pre-existing debt, it was taken for value. *Goodwin* v. *Massachusetts Loan & Trust Co.* 152 Mass. 189, 199. If the note was fraudulently put into circulation, the burden was on the plaintiff to show that it took the note for value before maturity and in good faith, that is, without notice or knowledge of the fraud.

For these reasons a majority of the court are of opinion that on the evidence the judge could not direct a verdict for the plaintiff against the objection of the defendant Morse, but that the case should have been submitted to the jury.

Exceptions sustained.

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BUTCHERS' SLAUGHTERING AND MELTING ASSOCIATION *vs.* COMMONWEALTH.

Suffolk. December 11, 1894. — April 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Taking of Easement in Land under Metropolitan Sewerage Act — Damages — Evidence.

When land or an easement in land is taken under the right of eminent domain, and damages are to be assessed as a compensation to the owner for the value of the land taken and the injury, if any, to his remaining land, the owner may put in evidence the reasonable cost of any necessary adaptation of his land to the new state of things produced by the public work for which his land was taken, if the adaptation and the cost are proper, having reference also to the market value of his own estate; and when such damages are to be assessed, if it is contended by the respondent that the damages are offset in whole or in part by some special and peculiar benefit caused to the petitioner's property by the public work for which his land was taken, the fair and reasonable cost to the petitioner of making that special and peculiar benefit practically available is to be taken into account in ascertaining the amount of special and peculiar benefit to be offset, and so may be given in evidence by the petitioner upon the assessment of damages.

At the trial of a petition for the assessment of damages for the taking of an easement in the petitioner's land, under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, 1890, c. 270), the petitioner contended that the laying of the State sewer through his land, which was used as slaughtering and rendering works, with drainage into a river, made a new adaptation of his works to the changed condition of affairs necessary and proper; and he introduced in evidence, without objection, an order from the State board of health to discontinue his drainage into the river, and subsequent letters to him from the sewer department of the city and the Metropolitan Sewerage Commission, concerning a plan of a particular or private sewer which he proposed to make to connect his works with the State sewer, which letters tended to show that such plan was satisfactory to both of those authorities; and there had been a view of the premises by the jury. The State sewer had been completed, and the petitioner was then building his proposed sewer upon his land parallel with the State sewer and connecting with it at three points. He was asked to state the expense of his particular sewer, and the question was excluded. *Held*, that the evidence should have been admitted.

At the trial of a petition for the assessment of damages for the taking of an easement in the petitioner's land, under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, 1890, c. 270), the respondent was allowed to show the mode of construction of the State sewer, and to introduce evidence tending to prove that the sewer would carry a considerable weight of buildings over it, and that, as repairs could be made from the inside through the man-holes, it would never be necessary to disturb the soil in repairing it. *Held*, that the evidence was competent.

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PETITION for the assessment of damages for the taking of an easement in the petitioner's land in the Brighton district of Boston, under the Metropolitan Sewerage Acts. Sts. 1889, c. 439, 1890, c. 270. At the trial in the Superior Court, before *Braley*, J., the jury returned a verdict for the petitioner; and the petitioner alleged exceptions to the rulings upon questions of evidence, which appear in the opinion.

The case was argued at the bar in December, 1894, and afterwards was submitted on the briefs to all the judges.

S. J. Elder, (*C. S. Lincoln* with him,) for the petitioner.

W. D. Turner, for the respondent.

BARKER, J. We are all of opinion that when land, or an easement in land, is taken under the right of eminent domain, and damages are to be assessed as a compensation to the owner for the value of the land taken, and the injury, if any, to his remaining land, the owner may put in evidence the reasonable cost of any necessary adaptation of his land to the new state of things produced by the public work for which his land was taken, if the adaptation and the cost are proper, having reference also to the market value of his own estate. And we are also all of the opinion that, when such damages are to be assessed, if it is contended by the respondent that the damages are offset in whole or in part by some special and peculiar benefit caused to the petitioner's property by the public works for which his land was taken, the fair and reasonable cost to the petitioner of making that special and peculiar benefit practically available is to be taken into account in ascertaining the amount of special and peculiar benefit to be offset, and so may be given in evidence by the petitioner upon the assessment of damages.

In the present case it was contended by the petitioner that the laying of the State sewer through its lands, which were used as slaughtering and rendering works, with drainage into the Charles River, made a new adaptation of its works to the changed condition of affairs necessary and proper, and it introduced in evidence without objection, an order from the State board of health to discontinue its drainage into the river, and subsequent letters to the petitioner from the sewer department of the city and the Metropolitan Sewerage Commission, concerning a plan of a particular or private sewer which the peti-

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tioner proposed to make to connect its works with the State sewer, and from which correspondence the jury might well find that the plan was considered a satisfactory one, both by the sewer department of the city of Boston, and by the board of Metropolitan Sewerage Commissioners. There had been a view of the premises by the jury, and it may be assumed that before the view such statements had been made to the court and jury in behalf of both parties as were necessary to enable the jury before viewing the premises so to understand the claims of the parties that the view might enable them thereafter to understand and properly apply the evidence.

At the time of the trial, the State sewer had been completed, and the petitioner was then building its proposed particular sewer, sixteen hundred and eighty-five feet in length, upon its own lands, parallel with the State sewer, and connecting with it at three points. Under these circumstances, the petitioner's treasurer was asked to state the expense of its particular sewer, and the question was excluded, and the petitioner excepted. The bill of exceptions states that "this evidence was offered as showing one element of damage suffered by the petitioner by the taking of his land," and the bill states no reason why the evidence was objected to or was excluded.

A majority of the court are of opinion that the exception to the exclusion of this evidence must be sustained. The question no doubt called for the cost of building a particular sewer which the petitioner had seen fit to commence; and there was no offer in terms to show that it was a reasonably necessary or proper expenditure to make in reference to its effect on the market value of the property, nor an offer in terms to show that this expense was the reasonable cost of the work which was in process, and to be done; and it was possible that the work may have been done extravagantly. But the correspondence in evidence tended to show that the petitioner's plans for the connection of its works with the State sewer by means of the sewer, the cost of which was offered in evidence, were reasonable; and there is no such presumption that in practical affairs men will engage in useless work, or will do it extravagantly, as to make it right to exclude the evidence offered, upon the ground that, though under some circumstances it might be admissible,

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yet sufficient grounds had not been shown without putting the exclusion of the evidence upon that basis, and giving an opportunity to supply the deficiency in the preliminary proof. Especially is this the case when upon a view the jury have themselves seen in progress the work the cost of which is offered in evidence, and so may be presumed to have some means from their own knowledge of determining whether it is being extravagantly done. We are confirmed in the view that the court treated the evidence as inadmissible under any circumstances, and did not exclude it because proper preliminary proof had not been made, by the following statement. "The court in instructing the jury alluded to this matter as follows: 'Something has been said here about the entering into this sewer by the petitioner, and at this point I may as well say something to you about this, though really it has very little, if any, bearing upon the issue tried here between the parties. You notice that you have had called to your attention that section nine of the chapter provides' that 'any person, firm, or corporation may, subject to the direction, . . . and subject to such terms, conditions, . . . connect private drains with said main sewer.' That is, after the sewer is completed, after it has become a part of the system of sewerage provided by the act, then under proper rules and regulations, which we must presume to be reasonable, those who desire to enter it can enter it. We have no occasion to try here what those rules and regulations are, or what they may be; whether they are reasonable or unreasonable; and the question what it will cost this petitioner by way of a tax on anybody to enter this sewer is not to be considered by you at all." This statement justifies the construction that the evidence was excluded because, in the opinion of the presiding justice, the matter of the petitioner's entering the State sewer had "very little, if any, bearing" upon the assessment of his damages. There is enough in the bill of exceptions to show that evidence which, with the evidence admitted, would have justified the jury in finding the reasonable cost of a reasonable adaptation of the petitioner's lands to uses to which they might reasonably be put in consequence of the taking which made the respondent answerable to them in damages, was excluded by the court, and the bill of exceptions does not justify us in holding that it could

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not have been found a necessary adaptation. There is another aspect of the case in which evidence of the reasonable cost of connecting the petitioner's premises with the State sewer was admissible, but we do not put the setting aside of the verdict upon that ground, for technical reasons. It was contended by the respondent, in reply to the petitioner's case, and the witnesses for the respondent testified that the damage to the petitioner's land by the taking was entirely offset by the benefits which it received; and it is apparent that the reasonable expense of connecting the petitioner's works with the State sewer was a matter material to this issue. But the bill of exceptions does not show that the evidence offered and excluded in chief was again offered in rebuttal, and although it might be presumed that the respondent's contention as to this special benefit had been disclosed to the court and jury in connection with the view and before the evidence was offered, we are not disposed to place the sustaining of the exception upon this ground.

We are all of opinion that the second exception should be overruled. Under this exception, the respondent was allowed to show the mode of construction of the State sewer, and to introduce evidence tending to prove that the sewer would carry a considerable weight of buildings over it, and that, as repairs could be made from the inside through the manholes, it would never be necessary to disturb the soil in repairing it. The petitioner contends that because the damages accrued, and were fixed at the time of the taking, no evidence should have been admitted of what has been since done in the construction of the sewer. But the respondent took only an easement, the right "to carry and conduct under the . . . lands, and therein to construct, operate, and forever maintain an underground main sewer, and connecting sewers, drains, manholes, and underground appurtenances, and to repair and renew the same." The petitioner still had the right to use his land in any way not inconsistent with the exercise of the easement taken, and may erect buildings over the sewer if it can do so without interfering with the reasonable exercise of the respondent's rights. *Clark* v. *Worcester*, 125 Mass. 226.

The question for the jury was, How far would the exercise of the right taken be likely to affect the petitioner's general right

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to use the property as owner? If nothing had been done at the time of the trial, the probabilities would necessarily have to be ascertained from a consideration of such facts as would bear on the use of the land likely to be made in the exercise of the right taken. The construction of the sewer before the trial simply made certain many elements of fact which before were problematical. These facts were properly placed before the jury, not to increase or diminish the damages which resulted from the taking, for these accrued at the instant of the taking, but to aid the jury in determining what the damages were. We are of opinion that the evidence was competent.

As the first exception is sustained, there must be a new trial. *So ordered.*

DANIEL E. STUART *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. January 17, 1895. — April 3, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Warning and Instructions as to Use of Dangerous Machine — Negligence.

An employee over twenty years of age and of average intelligence cannot recover of his employer for injuries occasioned in the use of a hay-cutting machine operated by horse power, if the elements of danger were obvious, and were such as ordinary prudence ought to have made him avoid without warning or instructions.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ, by the loss of his left hand in a hay-cutting machine operated by horse power. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

S. Williston, for the defendant.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiff.

KNOWLTON, J. The plaintiff was not regularly employed upon the hay-cutter, and it seems very probable that on the day of the accident, when Green, the foreman, sent him to take the

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place of one Gilfoye, Green had no thought of his feeding the hay into the machine instead of pitching it upon the table in the rear of the machine, or taking it away after it was cut. Certainly the plaintiff was not told by anybody to feed the hay into the machine, but voluntarily undertook to do it, because, as he says, he supposed that was the part of the work which Gilfoye was expected to do on that day. But the jury might have found that the direction given him was such as to justify him in taking his place at the machine to tend it. We therefore must consider the question whether the defendant was negligent in setting the plaintiff at work without warning him of the danger, and instructing him how to avoid it.

The evidence tends to show that the best device possible for the protection of persons working on the machine was attached to it in the form of a hood extending back two feet and a half from the knives. The evidence was uncontradicted that, since January, 1891, when hoods were placed on the forty-three machines used in the forty-three barns owned by the defendant, no accident has happened in the use of the machines except the accident to the plaintiff. The operation of the machine was simple and obvious to every one of ordinary intelligence; the knives were open to view, and the plaintiff well understood that he would be seriously injured if he allowed his fingers to come in contact with them. They revolved rapidly, and when the hay was passing through them, it was drawn forward with a great deal of force. All this could be seen in a minute by every observer. No one who saw the machine in operation could fail to know that if it was clogged, and if the hay was then loosened with the hand and started forward, it would go with great force as soon as it was brought within the traction of the revolving knives. It was apparent to everybody that it would be very dangerous to permit one's fingers to be caught in a tuft of hay which was about to pass forward between the knives. We see no evidence of any kind of danger which was not open and obvious to every one who saw the machine in operation.

The plaintiff at the time of the accident was twenty years and six months old, and was a "young man of ordinary intelligence and mental quickness." He testified that he had seen the machine work not more than three times before the day of the

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accident, and that on one previous occasion he had fed the hay into it for a few minutes. At that time he asked permission to feed it of the man who was working upon it. The duty of an employer to give instructions to one about to work on dangerous machinery exists only when there are dangers in the employment of which he has or ought to have knowledge, and which he has reason to believe his employee does not know, and will not discover in time to protect himself from injury. In the early cases the doctrine was applied in favor of boys. In favor of adults it should be applied with great caution. Where the elements of the danger are obvious to a person of average intelligence using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the exact degree of the danger, if the nature and character of it can easily be seen, is not enough to require warning and instruction to a man of full age and average intelligence. Something may properly be left to the instinct of self-preservation, and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved. *Russell* v. *Tillotson*, 140 Mass. 201. *Ciriack* v. *Merchants' Woolen Co.* 146 Mass. 182. *Goodnow* v. *Walpole Emery Mills*, 146 Mass. 261, 267. *Carey* v. *Boston & Maine Railroad*, 158 Mass. 228, 231. *Connolly* v. *Eldredge*, 160 Mass. 566. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153, 160. *Wilson* v. *Steel Edge Stamping & Retinning Co.*, *ante*, 315.

In this case it may be that no one could tell the exact degree of the force with which the hay would move forward with the traction of the knives, nor just how great the danger was until he ascertained by actual experiment; but anybody could see at once that there was danger in doing the work unless care was used to avoid letting the fingers be drawn forward to the knives. Any one knowing that there was such danger would be expected to proceed with great caution until he became familiar by experience with the forces with which he had to deal. We are of opinion that there was no evidence of negligence on the part of the defendant in failing to give the plaintiff instructions, and that therefore the jury should have been directed to return a verdict for the defendant. *Exceptions sustained.*

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SAIMAN SIRK *vs.* RICHARD ELA.

Suffolk. January 18, 1895. — April 3, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Sale — Construction of Contract — Tender — Parol Evidence — Answer — Equitable Defence — Statute.

At the trial of an action of contract to recover a sum of money placed in the hands of E., the defendant, to be applied by him, as the agent of S., the plaintiff, upon the purchase of certain premises, it appeared that E. signed an agreement acknowledging the receipt of the money of S., and stating that he agreed to recommend the sale to S. of the premises, and further reciting, "It is understood that if the sale is not completed within one month, I shall return said money, and it is understood that I do not bind myself, or attempt to bind any parties, to the completion of said transaction." *Held*, that the agreement must be construed as meaning if the sale was not completed within one month for any cause by either party; that the tender by W., the owner of the premises, within thirty days after the date of the agreement of a deed of the premises to the agent of S. did not complete the sale; and that evidence offered by the defendant to show what took place prior to, at the time of, and subsequent to the making of the agreement was rightly rejected, as it tended to vary and affect the written contract.

Even if an answer may be regarded as sufficient under St. 1883, c. 228, § 14, the defendant cannot avail himself thereof, if the facts offered in evidence would not, in view of the construction given by the court to the contract in question, entitle the defendant "in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action."

CONTRACT, to recover $500, placed in the hands of the defendant, to be applied by him, as the agent of the plaintiff, upon the purchase of certain premises in Boston. Trial in the Superior Court, before *Sheldon*, J., who allowed a bill of exceptions, in substance as follows.

It appeared in evidence that one Goodnough wrote a letter to Walter Ela, dated May 12, 1892, inquiring, "What will you take for that estate No. 1, 2, 3, and 4 Buttrick Place? I have a customer who wants to buy it for cash." Goodnough at the request of the plaintiff gave $500 to the defendant, and received the following paper, dated February 28, 1893: "Received of Saiman Sirk five hundred dollars, and I agree to recommend the sale to him of No. 1, 2, 3, and 4 Buttrick Place. It is understood that if the sale is not completed within one month, I

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shall return said money, and it is understood that I do not bind myself, or attempt to bind any parties to the completion of said transaction. Price to be ten thousand five hundred dollars. Richard Ela."

The defendant, in cross-examination of Goodnough, offered a deed from Walter Ela, trustee, to the plaintiff, dated March 27, 1893, intended to convey the property mentioned in the agreement of February 28, 1893, signed by the defendant, for the consideration named, but it was admitted that the property was never conveyed, and that a return of the $500 was demanded from the defendant on April 5, 1893, which was refused.

The defendant offered to prove that he represented the seller; that he never in any way represented the plaintiff; that he had authority to sell the houses for $11,000, and that when $10,500 was offered he was not authorized to bind the trustee, but, believing it for the interest of the trust under the then existing circumstances to sell at $10,500, he agreed to recommend the sale; that between February 28 and March 3, 1893, he got authority from Walter Ela, trustee, to sell at $10,500, and on said March 3 of the opinion of the judge of probate that the trustee could legally sell at $10,500, and that on said March 3 he saw Goodnough; that Goodnough was the plaintiff's agent; that he told him that Walter Ela, trustee, accepted the offer of $10,500; and that on said March 3 the defendant left with Goodnough a copy of the will under which Walter Ela was appointed trustee, and the old deed for purposes of examination of title.

The defendant offered to prove the transactions at the time of his signing the agreement of February 28, 1893, as tending not to vary, but to explain, what the parties meant by the words that were used; that that agreement was modified by the transaction of March 3, and was further modified by the tendering on March 27, 1893, by Walter Ela, trustee, to Goodnough, as agent for the plaintiff, a trustee's deed in proper form, conveying the premises to the plaintiff, and that on said day Goodnough agreed that the plaintiff should see the defendant and Walter Ela, trustee, the next day, at the defendant's office in Boston, at 12.45 P. M., if the plaintiff could procure the money to carry out the trade.

The defendant, in order to show the understanding of the parties as to the agreement of February 28, 1893, as written, and

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also to show the transactions of March 3 and March 27, offered to prove that on March 30 Goodnough called to see the defendant, said he was sorry Sirk could not procure the money to carry out the trade, that the defendant was "five hundred dollars in," and asked the defendant to give him a commission of $100 out of the $500; but that the defendant said that he had paid the money over to Walter Ela, trustee, and declined to pay any commission, as it had been understood throughout that Goodnough was the broker for Sirk, and not for the seller.

The defendant offered to prove that from May 13, 1892, Goodnough and Sirk both knew that the defendant was not the principal, but was agent for Walter Ela, trustee; that on March 30, 1893, before the suit was brought, Goodnough and the plaintiff both knew that the defendant had paid the money over to his principal; that the fact that the sale was not carried out was the fault of the plaintiff solely; that the defendant and his principal did all acts that either of them could be required to do for the completion of the sale, and that, according to the intent of the parties, the $500 was given to the defendant for no other purpose than as a forfeit, or as an earnest, or as binding the bargain in case the trustee should ratify the proposed sale at $10,500; and that the trustee did so ratify the sale.

The defendant was allowed to amend his answer, to the effect that the agreement of February 28, 1893, "does not show the true intent, meaning, and understanding of the parties thereto, and that under St. 1883, c. 223, § 14, the defendant will prove the true meaning and intent thereof; and that the true meaning of said paper was that the $500 should be retained by the defendant as a forfeit"; but the judge ruled that the amendment did not sufficiently set forth facts which would entitle the defendant to set up a defence under St. 1883, c. 223, § 14, ruled that the evidence offered of transactions subsequent to the execution and delivery of the agreement of February 28, 1893, was not sufficient to show a modification or alteration of the agreement therein contained; that the evidence offered was inadmissible under the answer and the amendment thereto, and directed the jury to return a verdict for the plaintiff, the defendant not desiring to go to the jury under these rulings. The defendant alleged exceptions.

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A. J. Daly, for the defendant.

J. D. Colt, (*J. Prentiss* with him,) for the plaintiff.

MORTON, J. We must take the contract as we find it. There is nothing in it binding the plaintiff to take a conveyance of the property, nor anything which shows that, if he refused to take a conveyance, he was to forfeit the $500. The agreement expressly provides that, if the sale was not completed within one month, the defendant was to return the money. In the absence of any qualifying words, we must construe that as meaning not completed for any cause by either party. The defendant expressly stipulates that he does not bind himself, nor "attempt to bind any parties to the completion of said transaction." The tender of the deed did not complete the sale. Nothing short of an actual conveyance of the title to the plaintiff would have done that. No doubt, if the plaintiff had bound himself to purchase, a tender of a sufficient deed would have entitled the defendant to specific performance. But in the absence of any valid agreement to that effect on the part of the plaintiff, or of any provision that he should forfeit the $500 if he did not complete the sale within a month, we do not see how his refusal to accept the deed entitled the defendant to keep the $500 which according to the terms of the agreement, the defendant personally bound himself to pay if the sale was not completed within one month.

The evidence offered by the defendant to show what took place prior to, and at the time of, and subsequent to the making of the agreement was rightly rejected as it tended to vary and affect the written contract. If the amended answer could be regarded as sufficient under St. 1883, c. 223, § 14, the facts offered in evidence would not in view of the construction which we give to the agreement, have entitled the defendant "in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action." *Roberts* v. *White*, 146 Mass. 256. *Sherman* v. *Galbraith*, 141 Mass. 440.

Exceptions overruled.

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JAMES W. TUFTS *vs.* JOHN E. BENNETT.

Suffolk. January 24, 1895. — April 3, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Breach of Contract — Action — Nominal Damages.

Where the seller sues the purchaser for the contract price of goods he has refused to accept, which goods were to be paid for by instalments, and the title to which was not to pass until the contract price was fully paid, the measure of damages is the difference between the market value at the time and place of delivery and the contract price, and, no evidence having been introduced of that difference, the court can award nominal damages only.

CONTRACT, to recover the purchase price of goods sold by the plaintiff to the defendant. Trial in the Superior Court without a jury, before *Hammond*, J., who found for the plaintiff in the sum of one dollar, and the plaintiff alleged exceptions, the material portions of which appear in the opinion.

W. M. Noble, for the plaintiff.

J. Bennett, for the defendant.

MORTON, J. The only question in this case relates to the measure of damages, and we think that the ruling of the court was correct. The contract was an executory one. Part of the goods ordered were kept in stock by the plaintiff, part were to be manufactured by him, part to be purchased elsewhere, and some labor and stock were to be expended in renovating certain apparatus for the defendant. The goods were ready for delivery at the time agreed, namely, July 1, 1892, and the plaintiff so notified the defendant, at the same time writing him that he understood that he, the defendant, was not ready for them, and that as a matter of accommodation he was willing to hold the goods a reasonable time. Thereupon the defendant saw the plaintiff, and an arrangement for the storage of the goods by him until October 1 was effected. The goods were set apart and tagged with the defendant's name. On January 2, 1893, the goods not having been delivered and no further arrangement for their storage having been made, the plaintiff wrote to the defendant that he should send the goods to him on the 4th. In response to this letter the defendant called on the plaintiff

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and an extension of the time of storage and delivery was granted by the plaintiff. Some time after, the defendant called and requested the plaintiff to rescind the contract. The plaintiff refused, and has always insisted on a performance by the defendant. The goods have remained in the plaintiff's possession, set apart and tagged with the defendant's name, and in storage for him. According to the contract, the defendant upon delivery was to honor a sight draft for four hundred dollars, and to execute to the plaintiff notes for the balance, and the title to the goods was to remain in the plaintiff till the notes were paid. The defendant has never honored any draft nor executed any notes, and the action is brought for the breach of his agreement in failing to do so. The court found that the defendant had repudiated the contract.

The rule seems to be pretty clearly established that the measure of damages in such a case is the difference between the market value of the goods at the time and place of delivery and the contract price. *Barry* v. *Cavanagh*, 127 Mass. 394. *Whitney* v. *Boardman*, 118 Mass. 242. *Clement & Hawkes Manuf. Co.* v. *Meserole*, 107 Mass. 362. *Cutting* v. *Grand Trunk Railway*, 13 Allen, 381. *Valpy* v. *Oakeley*, 16 Q. B. 941. *Bigelow* v. *Legg*, 102 N. Y. 652. *Unexcelled Fireworks Co.* v. *Polites*, 130 Penn. St. 536. *Grand Tower Co.* v. *Phillips*, 23 Wall. 471. *Atwood* v. *Lucas*, 53 Maine, 508.

No evidence, however, was introduced by the plaintiff as to such difference, he relying apparently upon his contention that the measure of damages was the contract price. The only thing, therefore, which the court could do was to award nominal damages, which it did.

Exceptions overruled.

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COMMONWEALTH *vs.* MARJORIE McCABE.

Middlesex. March 6, 1895. — April 8, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Conviction under former Complaint no Bar to Second Complaint.

The conviction of the defendant on a complaint for keeping and maintaining a common nuisance on April 1, 1893, and on divers other days and times between that day and December 27, 1893, to wit, a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors, is no bar to a complaint for keeping on April 29, 1893, intoxicating liquors with the intent to sell the same unlawfully in this Commonwealth, although the evidence relied on in the second complaint was a part of the evidence in the former one.

LATHROP, J. The only question in this case, which is not fully covered by the decision in *Commonwealth* v. *McCabe*, *ante*, 98, is that presented by the plea of the defendant's former conviction in that case. In the case at bar the defendant is charged with keeping, on April 29, 1893, intoxicating liquors with the intent to sell the same unlawfully in this Commonwealth. In the former case the defendant was charged with keeping and maintaining a common nuisance on April 1, 1893, and on divers other days and times between that day and December 27, 1893, to wit, a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors. These are distinct offences, and proof of the facts necessary to sustain this complaint would not be sufficient to sustain the former complaint. The conviction, therefore, of the defendant on the former complaint is no bar to this complaint, although the evidence relied upon in this complaint was a part of the evidence in the former complaint. *Commonwealth* v. *O'Donnell*, 8 Allen, 548. *Commonwealth* v. *Hogan*, 97 Mass. 122. *Commonwealth* v. *McCauley*, 105 Mass. 69. *Morey* v. *Commonwealth*, 108 Mass. 433. *Commonwealth* v. *Hazeltine*, 108 Mass. 479. *Commonwealth* v. *McShane*, 110 Mass. 502. *Commonwealth* v. *Brelsford*, 161 Mass. 61.

Exceptions overruled.

T. Gargan & P. J. Casey, for the defendant.

F. N. Wier, District Attorney, for the Commonwealth.

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ALBERT S. WALKER *vs.* ALBERT W. COOKE & another.

Suffolk. March 15, 1895. — April 3, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Action on Replevin Bond — Jurisdiction.

The Municipal Court of the City of Boston has jurisdiction of an action on a replevin bond, if the sum demanded is within the jurisdiction of that court, even though the action of replevin was brought in the Superior Court.

CONTRACT, against Albert W. Cooke and Joseph Lewis, as sureties on a replevin bond.

The action of replevin was brought in the Superior Court, and the action on the replevin bond in the Municipal Court of the City of Boston. The defendants set up in their answer, "that no notice of the judgment or order of court, set forth in the plaintiff's declaration, was given to said defendants before the bringing of the action, nor any demand made upon them to satisfy the same." They also answered in abatement, that, if they were indebted to the plaintiff on the bond, they were indebted to him jointly with the principal, Benjamin H. Benton, who was alive and ought to be sued with them in the writ. This answer in abatement was overruled.

In the Superior Court the defendants moved that the action be dismissed, for the reason that the court had no jurisdiction of the subject matter. It was also agreed that, if judgment should be entered for the plaintiff, it might be entered for the penal sum of the bond, three hundred dollars, and that execution might issue for the sum of one hundred and fifty-two dollars and seventy-eight cents and the costs of suit; and, further, that the court might find for the plaintiff, if it found that it had jurisdiction. This agreement also recited that "the defendants wish to be heard only on the question of jurisdiction."

The Superior Court overruled the motion to dismiss, and ordered judgment for the plaintiff for the penal sum of the bond, and assessed damages in the sum of one hundred and fifty-two dollars and seventy-eight cents; and the defendants appealed to this court.

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E. F. Collins, for the defendants.

G. A. Brown, for the plaintiff.

ALLEN, J. One condition in the replevin bond was to return the goods replevied in case such should be the final judgment. Such was the final judgment, and, upon the failure of the plaintiff in replevin to return the property, the bond was broken, and an action might immediately be brought upon it, without previous demand or suing out a writ of return. *Wright* v. *Quirk*, 105 Mass. 44. *Leonard* v. *Whitney*, 109 Mass. 265. The action of replevin was in the Superior Court; and the action on the replevin bond was brought in the Municipal Court. The only ground of defence which is urged to the action on the bond is that it ought to have been brought in the Superior Court, and that the Municipal Court had no jurisdiction. But we know of no rule of law or good reason requiring the action on the bond to be in the same court where the action of replevin was brought; and we find nothing in the argument for the defendants leading to that result. The sum demanded was within the jurisdiction of the Municipal Court; and the action might properly be brought there. That court, by express statute, has jurisdiction "of all civil actions and proceedings," wherein the sum demanded exceeds one hundred dollars, and does not exceed one thousand dollars, except where the title to real estate is put in issue. Pub. Sts. c. 154, § 59. *Judgment affirmed.*

WILLIAM HOBSON *vs.* CHARLES A. SATTERLEE.

Middlesex. March 21, 1895. — April 3, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Demurrer — Answer — Judgment.

On the overruling of a demurrer the plaintiff is not, as matter of law, entitled to judgment, but the court may direct a trial to be had on the merits on an answer previously filed.

LATHROP, J. The only question presented by the exceptions in this case is whether a plaintiff is entitled to judgment, as mat-

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ter of law, on the overruling of a demurrer to the declaration. The plaintiff contends that at common law a judgment would follow as a matter of course in such a case, and that this court has declared in *Montague* v. *Boston & Fairhaven Iron Works*, 97 Mass. 502, that this law in respect of demurrers has not been changed by the Practice Act. It is needless to say that no such declaration was made. In the case referred to, Mr. Justice Chapman, speaking of the words "and in like manner either party may demur to the allegation of the other party," in the Gen. Sts. c. 129, § 24, (Pub. Sts. c. 167, § 25,) said: "The last clause includes a right to demur to a particular and distinct allegation as well as to the whole answer, or to a distinct allegation in a count as well as to a whole count; and this makes the right to demur under our system coextensive with the right to demur under the system of special pleading." The proposition of the plaintiff finds no support in the language cited.

We have no occasion in this case to consider what the rights of the plaintiff would be at common law. The whole subject matter is regulated by statute. Section 11 of the Pub. Sts. c. 167, provides: "To raise an issue in law, the answer shall contain a statement that the defendant demurs to the declaration or to some one or more counts therein, as the case may be, and shall assign specially the causes of demurrer." Under this section demurrers are frequently inserted in answers to the merits. See *Young* v. *Gilles*, 113 Mass. 34. Section 12 states for what causes demurrers may be filed. That this section is not confined to demurrers in answers is shown by § 67, which provides: "When a demurrer is sustained, overruled, or withdrawn, the court shall make such order as may be fit respecting the filing of an answer or replication, or a trial of the facts."

In the case at bar, the defendant had filed an answer not waiving the demurrer on the same day that he filed the demurrer. We must assume, in the absence of evidence to the contrary, that these were filed within the time allowed by law. See Rules 16 and 17 of the Superior Court. When, therefore, the demurrer was overruled, the court could order the case to be tried on the answer already filed. This is clearly shown by the language of § 67. *Exceptions overruled.*

W. Hobson, pro se.

C. L. Abbott, for the defendant.

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GUSTAVUS A. DAMON & others *vs.* EDWARD CARROL & another.

Suffolk. December 11, 1894. — April 5, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Exceptions — Evidence — Question not raised in Court below — Breach of Poor Debtor's Recognizance — Authority of Magistrate — Declination to submit to Examination.

A bill of exceptions, if ambiguous, will be so construed as to raise only the questions raised and passed upon in the Superior Court.

Evidence not admissible if objected to, when admitted without objection has its natural probative effect.

The due authority of one acting *de facto* in an official capacity may be inferred when there is no evidence that he has usurped his office.

After a poor debtor has invoked the protection of Pub. Sts. c. 162, § 38, and agreed to submit to an examination, he cannot, without a breach of his recognizance, when he appears at the place and time and before the court which he has selected, decline to submit to such examination because the court has refused his request for a continuance, and the facts that the court thereafter proceeded to refuse to administer the oath and ordered the clerk to affix to the execution a certificate authorizing the commitment of the debtor, and that the execution was not produced, are immaterial.

CONTRACT, upon a poor debtor's recognizance, entered into by Edward C. Mitchell, Jr., as principal, and Edward Carrol as surety.

At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiffs in the amount of the recognizance, and interest from the date of the writ; and the defendants alleged exceptions. The facts appear in the opinion.

H. Dunham, (*W. E. Cassidy* with him,) for the defendants.

S. L. Whipple, (*R. W. Frost* with him,) for the plaintiffs.

BARKER, J. The bill of exceptions purports to state all the evidence. It consisted of original documents, a duly verified copy of the record of the Municipal Court of the Dorchester District, of oral testimony that the debtor, his attorney, and the creditor's attorney left the court-room fifteen or twenty minutes after the order authorizing the commitment of the debtor, and of the testimony of the clerk of the court that no mittimus was made out by him. This testimony of the clerk was the only

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evidence objected to. No exception was saved to its admission; but the court, after refusing to rule that upon the evidence the plaintiffs could not maintain the action, stated that all questions of law which might be raised on the evidence were open to the defendants, and then said that it should instruct the jury that, if they believed the evidence offered, they should find for the plaintiffs. There was a verdict for the plaintiffs, and the case is here upon the defendants' exception to the refusal of the ruling that upon the evidence the plaintiffs could not maintain the action, and to the ruling that, if the jury believed the evidence offered, they should find for the plaintiffs. The bill of exceptions states also that "the pleadings may be referred to, and the copy of the recognizance referred to in the declaration was not annexed, and no copy of the same was produced at the trial other than Exhibit C, and there was no agreement that Exhibit C was to be treated as a copy."

The defendants now contend, (1.) that there was not in the declaration "any recognizance set forth as should be done by copy of record, as in *Commonwealth* v. *Cutter*, 98 Mass. 31, 33"; (2.) that the evidence was not sufficient to support an action, "because no record of any magistrate was introduced in evidence, nor did any magistrate testify to any record"; (3.) that the certificate of the magistrate that the defendants did recognize in due form was "competent evidence only in case the extended record had not been made, which was not shown to be the case"; (4.) that "in an action for breach of a recognizance the mere production of the magistrate's memoranda and proof of his signature and official station does not make out a *prima facie* case for the plaintiff"; (5.) that "it was necessary also to prove the authority of the magistrate to take the recognizance"; and (6.) that "even if there was any recognizance no breach had been committed by the debtor."

The bill of exceptions is ambiguous, and receives different interpretations by different justices of this court. After the statement that the court refused to rule that upon the evidence the plaintiffs could not maintain the action, the bill recites that "the court stated that all questions of law which might be raised on the evidence above were open to said defendants." One construction of this sentence is, that among the questions of

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law which were to be open were the competency and the admissibility of the evidence. But a majority of the court are of opinion that, as no objection was made to the admission of any evidence except the testimony that no mittimus was made out, and as no exception was saved to the admission of evidence, and as no request was made for a ruling that the evidence was not competent to prove any fact or facts stated in any of the documents which were put in, the statement that "all questions of law which might be raised on the evidence above were open" should be construed to mean all questions of law upon the evidence as evidence before the jury; that is to say, all questions as to its probative effect and value. The admissibility of evidence depends so much upon preliminary proof and upon discretion, that a majority of this court are unable to give to the bill of exceptions a construction under which the admissibility of the evidence can be argued here when it does not appear to have been raised and passed upon below. The only question of admissibility there raised was as to the testimony that the clerk of the court had not made out a mittimus. There was in this testimony no contradiction of the record; it was simply to a negative, and was immaterial upon the question whether there was a breach of the recognizance.

We consider the grounds urged in support of the contention that the action cannot be maintained.

1. The first is that no recognizance was set forth in the declaration by copy of record. This, if true in fact, is not now open, because the question was not raised or passed upon in the Superior Court.

2. The second is that the evidence was not sufficient, because no record of any magistrate was introduced, nor did any magistrate testify to any record. In the opinion of a majority of the court this is untenable. The execution was in evidence, and indorsed upon it were the officer's original return, the affidavit, jurat, and court certificate authorizing the debtor's arrest, and an original certificate signed by the commissioner of insolvency before whom the declaration alleged the recognizance to have been made. The officer's return states that on April 27, 1892, he arrested the debtor by virtue of the execution, "and had him before Henry Austin, Esq., a commissioner of insolvency within

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and for the county of Suffolk, before whom he recognized with surety for thirty days (see magistrate's certificate annexed)." The certificate of the commissioner of insolvency, which in the bill of exceptions is called Exhibit C, is as follows:

"Henry Austin, 5 Tremont St., Boston. Commonwealth of Massachusetts. County of Suffolk, ss. April 27, 1892. I certify that E. C. Mitchell, Jr., the debtor named in the annexed execution, having been arrested and now held in custody by virtue of said execution by John B. Fitzpatrick, deputy sheriff, is before me to recognize with surety for his appearance before some court having jurisdiction to examine him as a poor debtor, and as provided in chapter 419, Acts of the year 1888, and chapter 162 of the Public Statutes; and said debtor did then and there recognize in due form, with Edward Carrol, of Boston, county of Suffolk, in the sum of $220.95, that within thirty days from this day he would appear before said court for said examination, first giving notice to the creditor of his intention so to do, as required by law. Henry Austin, Commissioner of Insolvency."

Here are two original statements, each made and signed by a sworn official, which state the circumstances necessary to enable the jury to find that the debtor recognized with the defendant Carrol as surety as alleged in the declaration. The return, read with the execution and the certificate to which it refers, and the certificate of the commissioner read with the execution to which it also refers, state enough, if their statements are believed, to justify the finding of every fact necessary to maintain the action, if a breach of the recognizance is otherwise proved. These original statements were in evidence, and the question is as to their probative value, and not whether they or either of them were competent or admissible to prove the making of the recognizance.

The question is not exactly the same as if the magistrate before whom such a recognizance had been entered into had died before extending his record; or as if the original record, no copy remaining, had been destroyed. There, if the making of the recognizance is to be proved, it must be otherwise than by the record or by copy. Here there is no allegation or proof that there was no record. It seems that such recogni-

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zances are nowhere explicitly required by statute to be made matters of record; nor are they required by statute to be returned to any court. Actions upon them are actions of contract, and not by writ of *scire facias*. But it is assumed by our decisions that such recognizances will be recorded by the magistrate before whom they are entered into, and the rights of the surety, at least, are not otherwise secured to him; for it would seem that he cannot surrender his principal unless he delivers to the jailer a copy of the record of the recognizance. Pub. Sts. c. 162, § 63; c. 163, §§ 12–31, particularly § 16. Assuming that it is the duty of the magistrate to make a record of the recognizance, and that, upon the issue whether such a recognizance has been entered into, any other evidence than the record or a duly attested copy of it would be incompetent if objected to; and assuming also, that, if evidence competent for some other purpose is admitted for that other purpose, its effect must upon request be limited to the purpose for which it is competent, the question for decision is, What should the jury do with the two original statements which were in evidence? In the opinion of a majority of the court the answer is, that, if the jury believed the statements to be true, they should make from them the reasonable necessary inferences of other facts, and with the facts explicitly stated and necessarily inferred they should find a verdict for the plaintiff. It is the ordinary case of something less than the best evidence, but of evidence admitted and to be dealt with by the jury. The return was the statement of a sworn officer, and the commissioner's certificate, although not required by statute to be indorsed upon the execution, was also a statement of a sworn officer, and no statute forbade him to put it upon the execution. Papers signed by trustworthy persons, if put in evidence before a jury, naturally tend, although not competent if objected to, to induce belief of the matters contained in them. Hearsay evidence usually is rejected because it lacks the corroboration of an oath or affirmation, and not because it has no natural tendency to induce belief. When hearsay evidence is incompetent, the reason for its exclusion is the same in principle as that which formerly excluded testimony from interested witnesses. It was thought that the effect of interest made it unsafe to consider the testimony of such

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witnesses, just as the lack of an oath makes it unsafe to consider hearsay evidence. But it was always held that, if testimony incompetent by reason of the interest of a witness was allowed to go before the jury, they might consider it as they would any other testimony. *Heely* v. *Barnes*, 4 Denio, 73. *Donelson* v. *Taylor*, 8 Pick. 390. 1 Greenl. Ev. § 421, and cases cited in notes, § 423, note 5. *Flagg* v. *Mann*, 2 Sumn. 486, 510. Hearsay evidence is treated by Bentham as in the nature of secondary evidence. See Wharton, Ev. §§ 170, 172. It is admitted in Scotland. Upon some questions hearsay is competent evidence everywhere, as in questions of age and of pedigree. In the case at bar the certificate and the return tend to show that the recognizance declared on was made, as the record of the Dorchester Municipal Court tends to show the matters there stated as facts.

3. The third ground, that the magistrate's certificate was not competent because it was not shown that there was not an extended record of the recognizance, is disposed of by the construction given to the bill of exceptions by the majority of the court, that the question of competency is not open.

4. It is no doubt true, that in an action for breach of recognizance the mere production of the magistrate's memoranda and proof of his signature and official station does not make out a *prima facie* case for the plaintiff. It is of course necessary that there should be some proof of a breach of the recognizance; and there was such proof in the case at bar. The production of the memorandum of the recognizance did not make a *prima facie* case in *Blake* v. *Mahan*, 2 Allen, 75, because in that case there was no proof of the breach of the recognizance.

5. The defendants contend that it was necessary to prove the authority of the magistrate who took the recognizance. The evidence showed that he was acting *de facto* as a commissioner of insolvency, and his due authority might be properly inferred in the absence of evidence that his authority was usurped. In *Petersilea* v. *Stone*, 119 Mass. 465, there was some evidence to show that the constable had no right to the office. See also *Coolidge* v. *Brigham*, 1 Allen, 333.

6. The remaining contention, we are all of opinion, is unsound. It proceeds upon a misconception of the respective

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rights of judgment creditors and judgment debtors when a debtor arrested upon execution is released from arrest upon a recognizance on condition that he shall deliver himself up for examination.

It is true that, when the debtor left the court-room, the court had declined to administer the oath and had ordered its clerk to affix to the execution a certificate to authorize the debtor's commitment. The debtor was at the place where his recognizance, if he had not already broken it, required him to be; and it was the duty of the plaintiffs, if the debtor had up to that time performed the conditions of the recognizance, and if they intended to have him committed, to see that an officer with the execution should be present when the certificate was ready to be affixed. If when the court was ready to affix its certificate an officer was not present with the execution, the debtor would not be required to wait, and might depart without thereby making a breach of the recognizance. *Jacot* v. *Wyatt*, 10 Gray, 236, 240. *Peck* v. *Emery*, 1 Allen, 463, 465. *Russell* v. *Goodrich*, 8 Allen, 150. *Lothrop* v. *Bailey*, 14 Allen, 514. *Goodall* v. *Myrick*, 111 Mass. 484. *Fuller* v. *Meehan*, 118 Mass. 135. But the debtor's recognizance required him to deliver himself up for examination. This means the examination provided by Pub. Sts. c. 162, § 38, for a judgment debtor arrested upon execution who has given notice that he desires to take the oath for the relief of poor debtors. When a debtor procures such a notice to be served, the creditor thereby acquires the right to examine the debtor in the mode and with the results pointed out by that section; that is to say, the right to have the magistrate examine the debtor on oath concerning his estate and effects, the disposal thereof, and his ability to pay the debt for which he is arrested; and the creditor may propose to the debtor any interrogatory pertinent to the inquiry, and may require the examination to be in writing, in which case it shall be signed and sworn to by the debtor and preserved. See Pub. Sts. c. 162, § 38. These rights, which the debtor by invoking the statutes has conferred upon the creditor, may bring disclosures which may enable him to satisfy his judgment. After having invoked the protection of the statutes and agreed to submit to such an examination, the debtor cannot, without a breach of his recognizance, when

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he appears at the place and time and before the court which he has selected, decline to submit to an examination. *Simpson* v. *Trivett*, 120 Mass. 147. After the debtor's request for a continuance on September 10 had been refused, he declined to submit to an examination. This was a breach of the recognizance, after which the court had no authority to order his arrest; and the facts that the court thereafter proceeded to refuse to administer the oath, and ordered the clerk to affix to the execution a certificate authorizing the commitment of the debtor, and that the execution was not produced, are all immaterial. *Simpson* v. *Trivett*, *ubi supra*. *Morgan* v. *Curley*, 142 Mass. 107. The breach was complete when the debtor declined to submit to an examination, and the subsequent proceedings were not only unnecessary, but beyond the power of the court. *Morgan* v. *Curley*, and *Fuller* v. *Meehan*, *ubi supra*. It does not appear that the further proceedings were asked for by the plaintiffs, and they are not estopped from insisting on the breach which the debtor had previously made. See *Vinal* v. *Tuttle*, 144 Mass. 14, and cases cited. The only remedy open to the creditor after the debtor declined to submit to an examination was this action for a breach of the recognizance. The amount of the verdict is not in dispute, and the exceptions must be overruled.

Exceptions overruled.

COMMONWEALTH *vs.* FRED M. SMITH & others.

Essex. March 5, 1895. — April 6, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Conspiracy to solicit Bribes — Indictment — Evidence — Exceptions — Constitutional Law — Privilege of Indicted Defendant testifying in his own Behalf.

Certain persons were indicted for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof for the purpose of influencing their action on the granting of the licenses. *Held*, on the evidence, that they were properly convicted.

Although the St. 1893, c. 417, § 147, which requires the clerk of a city to cause notice of the annual election for the choice of city officers to be printed in one or more newspapers published in that city, and to be posted in the office of the

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city clerk, does not expressly require a formal return of the publication of notice, yet if the clerk makes a return that notice of the election has been posted by him in the city clerk's office, but says nothing about publication in the newspapers, he is not precluded from afterward testifying that the notice has been published in the newspapers, nor from reading the publications therefrom.

At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof, for the purpose of influencing their action on the granting of the licenses, evidence that, at a meeting of the mayor and aldermen, held after the inception of the conspiracy but before the licenses were granted, it was voted, on motion of one of the indicted aldermen, that applications for licenses should be referred to the mayor and aldermen instead of to a committee on licenses consisting of the mayor and two aldermen, as theretofore, is competent against the alderman making the motion at least, and against the other indicted aldermen if they voted for it.

At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof, for the purpose of influencing their action on the granting of the licenses, it is competent for the prosecution to show the names of all the applicants for such licenses, although later in the case the names of the successful applicants appear.

At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof, for the purpose of influencing their action on the granting of the licenses, the prosecution, in order to fix a date, may show the date when a licensee was permitted to transfer his license from one place to another; and, for the same purpose, that a witness, after a conversation with one of the defendants, at once telephoned to a certain person.

At a criminal trial the prosecution, having sufficiently designated the time and place, inquired of one of its witnesses touching a certain conversation in which he had previously made statements on material matters inconsistent with his testimony, and subsequently sought to contradict him by the testimony of another witness, as is allowed by Pub. Sts. c. 169, § 22. *Held*, that it was doubtful whether the objection that the witnesses testified to different conversations, not having been taken at the trial, was open at the argument in this court. *Held, also*, that, if open, the same time and place for the conversation having been fixed by both witnesses, the evidence was competent as affecting the credit of the first witness.

At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof for the purpose of influencing their action on the granting of the licenses, an alderman not under indictment was properly allowed to testify that at a meeting of the mayor and aldermen, and just before acting on the licenses, the aldermen went into a committee room where they had a general conversation about the granting of the licenses; that the witness said that he wanted all the licenses to be granted, but would take no part in granting a portion of them only because that would look as if the aldermen were putting up a bid for the rest, but that the indicted aldermen wanted to grant a part of them only; and the objection that it did not appear that any one heard what such aldermen said in the committee room, not having been taken at the trial, is not open at the argument in this court.

At the trial of an indictment for conspiracy to solicit bribes, a witness for the

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defence who denies his agency for one of the defendants in soliciting bribes may, such agency being material, be contradicted by the prosecution for the purpose of affecting his credit.

If, at a criminal trial, a government witness testifies to a conversation at a certain time and place between himself and the defendant, the latter cannot, after a denial of such a conversation, put in evidence another conversation between them upon the same subject at another time and place.

No exception lies to the exclusion of evidence which is not reported and shown to be material.

At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof, for the purpose of influencing their action on the granting of the licenses, one of the indicted aldermen, who between the two meetings of the mayor and aldermen at which the licenses were granted and during the existence of the conspiracy is shown to have been in company with another defendant, S., a wholesale liquor dealer in Boston, with whom he had no subject of common interest except the granting of the licenses, and to have gone to Boston on the invitation of S., may be asked on cross-examination, for the purpose of affecting him only, but not S., as to his knowledge of what was publicly said after the first lot of licenses was granted as to the connection of the defendant S. with the granting of them.

A person under indictment, who at his trial testifies in his own behalf, may be asked on cross-examination, for the purpose of affecting his credit, whether, when a witness before the grand jury investigating the same matter, he did not decline to testify on the ground that he might criminate himself.

INDICTMENT, in three counts, for conspiracy. The second count, upon which the defendants were convicted was as follows:

"And the jurors aforesaid, on their oath aforesaid, do further present that Horace I. Pinkham, Charles H. Cox, Fred H. Cate, George O. Tilton, William W. Ham, Charles H. Croy, and Hadley H. Hoyt, all of Haverhill in said county of Essex, at Haverhill in said county of Essex, on the Tuesday next after the first Monday of December in the year of our Lord one thousand eight hundred and ninety-three, to wit, on the fifth day of December in the year of our Lord one thousand eight hundred and ninety-three, said fifth day of December being the day of the annual municipal election of the city of Haverhill, a municipal corporation duly established by law and located within said county of Essex, were severally duly elected by the qualified voters of the city at large, voting in their respective wards, as aldermen of said city, to severally hold their said offices as aldermen for one year from the first Monday of January next following the said fifth day of December in the year of our

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Lord one thousand eight hundred and ninety-three, and until a majority of the new board should be elected and qualified in their places, said first Monday of January being the first day of January in the year of our Lord one thousand eight hundred and ninety-four, the said Horace I. Pinkham being then and there at said annual municipal election chosen from and by the qualified voters of the city at large, the said Charles H. Cox being then and there at said annual municipal election selected from the first ward of said city, the said Fred H. Cate being then and there at said annual municipal election selected from the second ward of said city, the said George O. Tilton being then and there at said annual municipal election selected from the third ward of said city, the said William W. Ham being then and there at said annual municipal election selected from the fourth ward of said city, the said Charles H. Croy being then and there at said annual municipal election selected from the fifth ward of said city, and the said Hadley H. Hoyt being then and there at said annual municipal election selected from the sixth ward of said city, and that the said Horace I. Pinkham, Charles H. Cox, Fred H. Cate, George O. Tilton, William W. Ham, Charles H. Croy, and Hadley H. Hoyt thereafter, to wit, on the said first day of January in the year last aforesaid, severally duly qualified as such aldermen, and then and there severally became and were municipal officers, to wit, aldermen of said city of Haverhill, and thenceforward severally continued to be municipal officers, to wit, aldermen of said city of Haverhill, until the day of the finding of this indictment; and that at the said annual municipal election of said city of Haverhill, holden on the said fifth day of December in the year of our Lord one thousand eight hundred and ninety-three, at said Haverhill, the legal voters of said city of Haverhill duly voted to authorize the granting of licenses for the sale of intoxicating liquors in said city of Haverhill for the year commencing on the first day of May in the year of our Lord one thousand eight hundred and ninety-four, by then and there at said annual municipal election, duly and by lawful majority vote, voting 'Yes' upon the question, 'Shall licenses be granted for the sale of intoxicating liquors in this city?' the warrant for said annual municipal election duly containing an article providing for a vote upon

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said question, whereby the mayor and aldermen of said city of Haverhill, duly elected and qualified, and holding their offices for one year from the first Monday of January in the year of our Lord one thousand eight hundred and ninety-four, and until a majority of the new board should be elected and qualified in their places, might lawfully grant licenses of the first five classes for the sale of intoxicating liquors for the year commencing on the first day of May in the year of our Lord one thousand eight hundred and ninety-four.

"And the jurors aforesaid, on their oath aforesaid, do further present that Fred M. Smith, of Boston in the county of Suffolk and said Commonwealth, Charles A. Kimball, Fred H. Cate, George O. Tilton, William W. Ham, and Hadley H. Hoyt, all of said Haverhill, in said county of Essex, did, at said Haverhill, on the first day of February in the year of our Lord one thousand eight hundred and ninety-four, then and there well knowing the premises, unlawfully and maliciously conspire, combine, confederate, and agree together, and with divers other persons whose names to the jurors are unknown, to unlawfully counsel, solicit, incite, and procure divers persons who should thereafter duly make applications to said mayor and aldermen of said city of Haverhill for licenses of any of the first five classes to sell intoxicating liquors in said Haverhill, for the year commencing on the first day of May in the year of our Lord one thousand eight hundred and ninety-four, and whose names and a further description of whom are to the jurors unknown, unlawfully and corruptly severally to give gifts and gratuities, to wit, certain sums of money, the amount, value, and further descriptions of which said sums of money are to the jurors unknown, to the said Fred H. Cate, George O. Tilton, William W. Ham, and Hadley H. Hoyt, they then and there being aldermen of said city of Haverhill as aforesaid, the said applications for licenses to sell intoxicating liquors being then and there matters which might by law thereafter come and be brought before them, the said Fred H. Cate, George O. Tilton, William W. Ham, and Hadley H. Hoyt, in their official capacities of aldermen as aforesaid, with intent on the part of said divers persons who should make applications for licenses as aforesaid then and there, by the gifts and gratuities aforesaid, to influence the acts,

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votes, opinions, decisions, and judgments of the said Fred H. Cate, George O. Tilton, William W. Ham, and Hadley H. Hoyt, in their official capacities of aldermen as aforesaid, upon the said applications for licenses to sell intoxicating liquors in said Haverhill thereafter to be duly made as aforesaid, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided."

The first count was the same as the second, except that it averred that the gifts or bribes were to be given to Cate, Ham, and Hoyt, instead of to Cate, Ham, Hoyt, and Tilton. The third count alleged that the defendants conspired to procure licenses to be granted to such persons as should give gifts of money to certain of the aldermen, to influence their action in the matter of granting the licenses.

At the trial in the Superior Court, before *Lilley*, J., the defendants seasonably moved to quash the indictment for reasons, which, so far as applicable to the second count are as follows. 1. That the indictment contained no averment that anything was done by the defendants, or either of them, to effect the object of the alleged conspiracy. 2. That it merely alleged that the defendants conspired to solicit certain persons who might not then be in existence, if such persons should at some time thereafter make applications for licenses to sell intoxicating liquors to corruptly influence the aldermen of Haverhill in their judgment or decision by gifts or gratuities. 3. That it did not appear that any applications would be made or were intended to be made by any one for such licenses, or that the aldermen had granted or proposed to grant licenses. 4. That the acts alleged constituted no crime at common law or under the statute. 5. That it did not appear that the persons alleged in the indictment to have been elected aldermen were elected by the qualified voters of the city of Haverhill, or that they were elected aldermen thereof. 6. That it did not appear that the legal voters of the city of Haverhill lawfully voted to authorize the granting of licenses during the year 1894, nor that any article upon the question "Shall licenses be granted for the sale of intoxicating liquors?" in Haverhill was inserted by the aldermen in the warrant for the annual municipal election held previous to the time of the offence alleged. 7. That it did not

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appear that Tinkham, Cox, Cate, Ham, Croy, and Hoyt were elected as aldermen of Haverhill, or qualified or had authority to act as such.

The motion was overruled, and the case was submitted to the jury, who returned a verdict of not guilty as to the first count, and, by direction of the judge, and with the consent of the prosecution, as to the third count also; and returned a verdict of guilty on the second count. The defendants alleged exceptions.

After verdict, the defendants moved in arrest of judgment, on the ground that, as they had been acquitted on the first and third counts, they could not be convicted on the second count so far as the conspiracy to solicit persons to pay money to Cate, Ham, and Hoyt to influence their votes was concerned, and that a conspiracy to solicit applicants for a license to pay money to Tilton alone was not sufficient to constitute the offence set forth in the second count.

The motion was overruled; and the defendants alleged exceptions. The material facts appear in the opinion.

A. Hemenway, (*W. E. Russell* with him,) for Smith.

G. C. Dickson & C. S. Knowles, (*E. B. Fuller* with them,) for Kimball.

E. B. Fuller, for Cate and Ham.

H. P. Moulton, for Tilton.

W. H. Moody, District Attorney, for the Commonwealth.

ALLEN, J. The conviction was only upon the second count of the indictment. The motion to quash and the motion in arrest of judgment were not argued in behalf of any of the defendants, though they were not expressly waived. No objections to the count have been pointed out. We see no ground for quashing it, or for arresting the judgment.

The defendants object that the evidence was not sufficient to warrant a conviction. The grounds of objection relied on are, (*a*) that no conspiracy between the defendants was proved; (*b*) that certain of the defendants took no part in any conspiracy; (*c*) that if there was a conspiracy, it was not with reference to all four of the aldermen named; and especially that there was no conspiracy to solicit bribes for Tilton.

A conspiracy may be proved by circumstantial evidence, and

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this is the usual mode of proving it, since it is not often that direct evidence can be had. The acts of different persons who are shown to have known each other, or to have been in communication with each other, directed towards the accomplishment of the same object, especially if by the same means or in the same manner, may be satisfactory proof of a conspiracy. Carson's Am. Cas. on Conspiracy, c. 5. 3 Greenl. Ev. § 93. 2 Bish. Crim. Proc. § 227. *United States* v. *Cole*, 5 McLean, 513. *State* v. *Sterling*, 34 Iowa, 443. *Archer* v. *State*, 106 Ind. 426.

The order of introducing the evidence is within the discretion of the presiding judge. 3 Greenl. Ev. § 92. *State* v. *Winner*, 17 Kans. 298. *Bloomer* v. *State*, 48 Md. 521. *State* v. *Jackson*, 82 N. C. 565. Carson's Cases, *ubi supra*.

An examination of the testimony, which is reported to us in full, satisfies us that the jury were warranted in finding that there was a conspiracy to solicit bribes for aldermen; that all the defendants took part therein; and that the purpose was to solicit bribes for the four aldermen named in the indictment. There being *prima facie* evidence of a conspiracy, the participation of each defendant therein may be shown by his own acts and declarations during the existence of the conspiracy; and these same acts and declarations may also tend to establish the conspiracy itself. The testimony which was relied on by the prosecuting officer tended to show the following state of things.

The defendant Smith was a wholesale dealer in liquors in Boston, with customers in Haverhill, at which place the defendant Kimball was his agent. The other four defendants, Tilton, Cate, Ham, and Hoyt, were aldermen of Haverhill. There were in all seven aldermen, but there was no charge or evidence against the other three. The whole number of licenses to sell liquors which could be granted in Haverhill was twenty-seven. The licenses would date from May 1. On April 16, 1894, fifteen licenses were granted, and on April 27 twelve more. The whole number of applications for licenses was forty-one. Prior to March 6, 1894, when it is contended that the conspiracy was first entered into, the defendant Kimball knew all of the four indicted aldermen; Smith was well acquainted with Tilton, had perhaps met Cate once or twice, though he

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did not remember having done so, and did not know Ham or Hoyt. One evening Tilton mentioned to Kimball that he was going to Boston the next day, and Kimball said he would go down with him and take him out to dinner. They accordingly went, the date being March 6; Tilton, seeing Cate and Ham in Boston, invited them to the dinner, and they were to come for him to the store of the defendant Smith. Tilton also met McDonald, a licensed liquor dealer of Haverhill, and a customer of Smith, on the street, and they went together to Smith's, and after a while Cate and Ham went there also. Kimball was already there; and the six went to a hotel in which Smith was interested, remained for over three hours, dined there, and took a carriage for a drive. McDonald left them for a time at 6.30 P. M., and afterwards met them at another hotel at 10 P. M., where all had a lunch (as it was called) at Tilton's expense, and all but Smith went home together in a late train. Cate testified that the subject of licenses was mentioned, and that Smith tried to pump him. It did not appear that they had any other subject of common interest. On April 13, Smith sent some liquors to Tilton, to Cate, to Ham, and to Hoyt; his purpose and object, as he testified, being that of good fellowship and to get their good will. Kimball knew that the liquors were sent, and the four aldermen all accepted them. On April 14, the four aldermen, without having been sent for, went to visit the mayor at a place four or five miles from Haverhill, and they all met there. A meeting of the aldermen was called for April 16. Six aldermen were present, and on motion of Tilton it was voted by the four indicted aldermen to grant licenses, the mayor and two aldermen opposing. A question arose as to acting upon a part only of the applications for licenses. One alderman, Pinkham, objected to doing this, because it would look like putting up a bid for the rest. That course, however, was adopted, the four indicted aldermen voting for it; and it was voted on motion of Ham to grant not exceeding fifteen licenses at that meeting. Fifteen licenses were accordingly granted. The defendant Smith was in Haverhill on that day, and was in the city hall at the time of the meeting of the aldermen. Kimball was also there. Smith told Cate and Tilton who his customers were, and that, if they could do anything

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for him, he should appreciate it. He also told one Dearborn before the meeting that the aldermen would vote that night on some of the licenses. Before that date, these four aldermen had met Kimball at a supper at a restaurant in Haverhill, and three of them had also met him on another evening at the same place. On the evening of April 16, the six defendants were all together at another restaurant, the proprietor of which had that day received a license. The foregoing evidence had a tendency to show an intimate and suspicious companionship of the defendants, and some common purpose, before and on the day when licenses were first granted.

Cate testified that after the first lot of licenses was granted there was a good deal of public talk and excitement in Haverhill, and that he had heard Smith's name mentioned a few times in connection with the granting of licenses. On or about April 21, the defendants Cate, Ham, and Hoyt went together to Boston by Smith's invitation, and in the evening visited the Italian quarter of the city and had a supper with Smith, who had got an officer to go with them. This had a tendency to show that the common purpose, at least so far as those four were concerned, was still continuing. In order to show that this common purpose was the same that was charged in the second count of the indictment, testimony of acts and declarations of the several defendants were relied on as follows.

Before April 16, Smith and Kimball both said or intimated to Leighton, who was an applicant for a license, that he would have to pay money in order to get it; that he had better see others of the aldermen besides Pinkham and Croy. Smith told him that it would cost him $200 for his license, and told him "to get a hustle on, and go and see the aldermen"; and that the money was to be paid to Smith. No license having been granted to Leighton on April 16, Kimball advised him the next day to go to Boston and see Smith, which he did, and Smith told him he would have to "see those aldermen and settle to get a license," and to go and see Hoyt without fail. Leighton went the next morning to see Hoyt, who intimated that he wanted money, and told him that whatever Smith said was all right. Leighton within a day or two told this at Haverhill to Smith, who said he would go down town and see what

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he could do for him, and if he could n't do anything Leighton was to have a couple of hundred dollars in money ready for him when he came back.

Porter C. Croy testified that between April 1 and April 10 Kimball told him that his brother, Alderman Croy, must be a damn fool, when he might as well get $400 or $500 out of it as nothing. The witness asked him, "Have n't you got enough votes now?" Kimball told him (in substance) that he had, and that he had got Aldermen Cate, Ham, Tilton, and Hoyt fixed up. Being asked where he was going to get the money to pay the $400 or $500 to witness's brother, Kimball replied, "I will take care of that."

Connolly testified that, between the granting of the first and the second lots of licenses, he told Smith that he would like to have a license; that Smith told him the boys were getting up a pool to carry on the campaign next fall to have the city vote in favor of license; and that $500 should be paid by Connolly, and afterwards told him that he would let him down for $200; and that if he paid $200 he should have a license.

Bourque testified to a conversation with Tilton between the granting of the first lot of licenses and the second. Bourque was interested to get a license for one Roque and told Tilton there was a rumor that money was needed to get the licenses. Tilton said he did n't know, and at any rate he would n't take any money from anybody for his vote; he would find out, and if there was anything new he would let Bourque know. Afterwards, before April 27, Tilton told him they were all bidding to get their licenses, and he told Bourque to see Roque and tell him it would require $200 for his license; "if he gives you the money, you come to me, and I will tell you who to give it to." Tilton had a slip of paper with names upon it, and sums marked against each; $200 against Roque's.

Merriam also interceded for Roque with Tilton, who said to him, "I would not take a dollar from any man; but if you fellows want Roque to have a license, you will have to settle with Cate and Ham." Ham came in; witness asked him if he would vote for Roque's license. He said he thought he would; he supposed there was a way to get at it. Cate came in. Merriam asked Cate if he would vote for Roque; he said he thought he would.

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Donahue was an applicant who failed to get a license on April 16. Kimball went to his store and told him he would like to have Francis (Donahue's brother) see Fred (the defendant Smith); that Fred could help him. Donahue went to see Smith, who said it would be necessary to have a fund to protect themselves, and get the city into the "Yes" column, for license. Donahue asked what his contribution would be, and was told about $300, and Smith said he would be in Haverhill on Monday.

To Dearborn, an applicant, Smith said, on April 16, there was great need of doing something to keep the city in the "Yes" line; that in order to do it, it took money. Dearborn said he was always willing to take hold and help, and asked how much it would be, and what they were going to pay. Smith said about $300, he thought. He said he was forming a club.

Cate sent Smith to Dr. Clement, who had asked Cate as to the way of getting a license and whom to see.

Carroll was an applicant for a license. He got none on April 16, but obtained it on April 27. He talked with Cate, who asked or ordered him to send some liquor to Ham, which was done. He talked with Hoyt, who said he would not advocate Carroll's license with the other aldermen unless he had some money to do it with; and that it was the understanding that men who got licenses should pay for them, and referred Carroll to the other aldermen. Before April 16, Carroll talked with Tilton, who told him he could do business with Hoyt and Cate, and could buy them, and assured Carroll of his own support. Afterwards, April 11, Tilton called on Carroll and said, "I came to talk with you about your license. What I say to you is never to go any further. I give you this as strictly Masonic. You can have a license, but three of the aldermen must be paid $150 apiece. I don't want a cent. You shall have my vote." Carroll said he should not pay money to continue his business, but "any one who would interest themselves to assist me to procure a license, or would devote any of their time in my behalf to procure the same, I should of course expect to pay them for their time," and asked what day they would want the money. Tilton said, "Any time."

As bearing upon Tilton alone, there was evidence that he

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afterwards tried to persuade Carroll not to say anything before the grand jury about the conversation.

Taking all the evidence together, of which the foregoing is an abstract of only the most significant portions, it was sufficient to warrant a finding by the jury that all of the defendants took part in a conspiracy to solicit applicants for licenses to give money to all four of the aldermen named. The evidence tended to show that Smith and Kimball were the chief agents to communicate with the applicants for licenses. It is true, that it was sometimes represented that the money was wanted to be used in the city election, which was to take place in the following December. But the jury might well infer that, if money was wanted from applicants for licenses just before the time for granting licenses, it was to be used in aid of their obtaining licenses. It was specially urged that the evidence did not warrant a finding that Tilton was to be paid anything. It is true that Tilton said to Bourque, Merriam, and Carroll that he would not take any money himself. But from his relations and communications with Smith and Kimball and with his three associates, and from his interest in the general scheme of inducing payments of money, it might be inferred that the four aldermen were acting together, and that he was to be included in the distribution of the money when obtained, notwithstanding his verbal disclaimer to Bourque, Merriam, and Carroll.

The other objections relied on in argument relate to the admission or exclusion of evidence, and to the instructions of the court in relation thereto, and are as follows.

1. The city election for the choice of aldermen was held on December 5, 1893. By St. 1893, c. 417, § 147, the city clerk, under the direction of the board of aldermen, was required to cause notice of the meeting to be printed in one or more newspapers published in the city, and also to be conspicuously posted in the office of the city clerk; but there is no express requirement that he should make a formal return. In the warrant, as it was called, or notice for the election issued by the city clerk, an order was recited that notice of the above meetings shall be given by publishing a copy twice in two specified newspapers, and by posting a copy of the same in the city clerk's office. The city clerk made a return thereon, that a certified copy of

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the notice had been posted by him in the city clerk's office, but said nothing about the publications in the newspapers, and at the trial he was allowed to testify that the copies had also been published in the newspapers, and to read the said publications from the newspapers; but the defendants objected that the omission in the return as to publication in the newspapers could not be thus supplied, and that it did not appear that the aldermen were duly elected.

We do not wish to affirm that the return of the city clerk was, of itself, evidence of as high a character as his sworn testimony; but, assuming this in favor of the defendants, yet an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election. Dillon, Mun. Corp. § 197, note. *Commonwealth* v. *Smith*, 132 Mass. 289. The aldermen were elected and acted as such without objection, and no question as to the validity of their election was raised, so far as appears, until the trial of this case.

2. There was evidence to show that at the outset the mayor and Aldermen Pinkham and Croy were appointed a committee on licenses, under an old rule formerly adopted, but not specially re-enacted during the current year; and that on March 19, 1894, on motion of the defendant Tilton, a vote was passed that the mayor and aldermen should be a committee to whom all applications for the sale of liquors should be referred; and that thereafter only applications for druggists' licenses were referred to the committee composed of the mayor and Aldermen Pinkham and Croy. The effect of the vote was to change the course of proceedings on applications for all other licenses, so that the four aldermen now under indictment should join in passing upon them in the first instance. This evidence was competent as against Tilton, at least, and would be competent against the other indicted aldermen, if they voted for it.

3. Evidence was admitted of the applications of forty-one applicants for licenses. The objection suggested, but not much pressed, to this evidence is that, since the names of the successful applicants appeared later in the case, the jury might thus learn who failed to procure licenses, and might be led erroneously to infer partiality on the part of the aldermen. We see no force in this objection.

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4. Evidence was admitted, under objection, of the date when the witness McDonald was allowed to transfer his license from one place to another. This evidence was offered merely to fix a date; and the date had some significance in the subsequent testimony of McDonald and of Arnold. This objection is not dwelt on, and is without force.

5. The witness McDonald, having testified that he paid nothing to any one in respect to granting his license, and that he knew of nobody who did so, was asked if he had a conversation with one Arnold in the latter's sales-room within one or two days before the transfer of his license, (which transfer was applied for on March 12,) in which he said to Arnold in substance that "different ones to his knowledge had put in from $100 to $200 apiece around to get the licenses; . . . it cost me $100; . . . I ain't saying anything about who I paid it to, but Hoyt got it." The witness answered that he had no recollection of saying anything to him of the kind, and nothing in substance of the kind. These latter questions were asked with a view to contradicting him, as allowed by Pub. Sts. c. 169, § 22, under which it is necessary to mention to the witness "the circumstances of the supposed statement, sufficient to designate the particular occasion." It is now objected that the particular occasion was not mentioned to McDonald; but we think the time and place were sufficiently fixed.

It is also objected that the questions to McDonald were on immaterial matters, and that the government was bound by his answers. But it would be plainly material to show that at this time, which was after the date when the alleged conspiracy began, he and others were paying money in order to get licenses, and that Alderman Hoyt had got the money paid by him. Arnold was subsequently called as a witness, and it was sought to contradict McDonald by him. The objection to Arnold's testimony, which is now relied on, is that he was permitted to testify to an entirely different conversation with McDonald.

It is doubtful if this ground of objection is open to the defendants, as it was not taken at the trial. If open, the time and place fixed by Arnold for his conversation were the same, namely, just prior to the transfer of McDonald's license, and at Arnold's sales-room. Although his testimony did not contradict

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McDonald so fully as the government appeared to expect, yet to some extent it contradicted him, and it tended to show that McDonald then said that it had cost him about $100, (meaning, in order to get his license,) and that Hoyt might have got it, or some of the others. Merely as affecting the credit to be given to McDonald as a witness, this evidence was competent; and to this it was carefully limited in the instructions to the jury.

6. Alderman Pinkham was allowed to testify that at the meeting of April 16,* just before acting on the applications for license, the aldermen took a recess and went into the committee room; that they all talked about granting the licenses; that they took a recess to go in and talk the matter over; that he said he wanted to go in and grant all the licenses, but would n't go in and take any part in granting part of them, because it would look as if they were putting up a bid for the rest of them; that it was a general conversation, and each of the four aldermen wanted to grant the licenses (i. e. a part of them). It is now urged that it does not appear that any one heard what Pinkham said. This ground of objection was not stated at the trial, and it is not now open. It seems probable that the defendants heard it, and if they did not of course the jury would have been instructed to disregard it, if a request to that effect had been made. The evidence was competent, as showing the course pursued by the four indicted aldermen, in view of the objections of the mayor and of the witness.

7. Dr. Clement, after testifying to a conversation with the defendant Smith, was allowed to say that he at once telephoned to Arnold. This was admitted merely as fixing a time, and nothing was admitted of what was said through the telephone. It was competent for this purpose.

8. Laubham, who was Tilton's clerk, being a witness for the defendants, testified on cross-examination that he did not on a certain occasion say to Carroll, in substance, "George [Tilton] wants to get that money"; that Tilton did not ask him to get any money from Carroll; and that he did not tell Carroll that

* It appeared that one of the aldermen was absent from this meeting, and that the mayor opposed the granting of licenses, saying that it was his wish that no licenses should be granted until the full board was present.

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he, witness, was the middleman, and that it would be safe to give the money to him. The government was allowed to call Carroll in contradiction. The defendants now contend that, as Laubham denied his agency for Tilton, his declarations were immaterial, and could not be contradicted. But it was material whether he was or was not Tilton's agent, and his denial of agency might therefore be contradicted merely for the purpose of affecting Laubham's credit as a witness, to which it was limited. *Hathaway* v. *Crocker*, 7 Met. 262.

9. The witness Croy, brother of Alderman Croy, testified to a conversation with the defendant Kimball, while driving with him to Boxford at some time between the 1st and 10th of April. The most significant things testified to were, that Kimball said Croy's "brother must be a damn fool, when he might as well get $400 or $500 out of it as nothing"; to which Croy said, "Kimball, the first thing you know, you will get yourself into trouble if you do anything like that." Kimball said, "Yes, you always was a damned fool and scared to death, or you might have sold more rum, and got more money." Croy said, "Have n't you got votes enough now? Have n't you got Alderman Cate, and Alderman Cox, and Alderman Ham, and Alderman Tilton fixed up?" Kimball replied, "Yes." And then in answer to the question, "Alderman Cox?" Croy answered, "No, the four aldermen." In answer to the question, "What four?" Croy said, "Alderman Cate, Alderman Ham, Alderman Tilton, and Alderman Hoyt." When Kimball spoke of the $400 or $500, Croy asked where he was going to get the money to pay the $400 or $500 to Croy's brother, and Kimball replied, "I will take care of that." Croy testified positively that he was not mistaken as to the place of this conversation, and that it was not in his drug store, and was not about Thomas McDonald, or relating to the transfer of McDonald's license. Kimball was called in defence to contradict Croy, and fixed the time of the drive to Boxford as April 8, but denied in detail that he then said any one of the things above mentioned which were attributed to him, or that the conversation related at all to licenses. He then testified that he had another conversation with Croy in Croy's store about the 1st of March, and was asked what it was. Objection being made, Mr. Hurlburt, for the defence,

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said, "We claim there was not any talk on the road to Boxford about licenses, but that previous to that time Croy and Kimball did have a conversation with reference to a license or transfer of a license, and that the interview that Croy is trying to detail upon the stand was not the interview in Boxford, but was the interview that took place in the store between Kimball and Croy." The court asked, "How is it competent to show that on another occasion they did have a conversation somewhat similar to that, but it was not on that occasion?" Mr. Moulton, also for the defence, said, "Because time is not the most essential thing. The most essential thing is what occurred between those two men. I suppose any witness may be mistaken as to the time. We propose to show that there was a conversation between these parties in which there was something said from which we shall ask the jury to find that that was the conversation that this witness has given an incorrect account of." The court: "If the point is that Croy was mistaken as to the time, but not as to the conversation, the substance of it, of course you may show it was another time when that happened, but I don't think you are entitled to show that there was another conversation between him and Croy with reference to the same matter, because the Commonwealth has asked about one conversation alone. In other words, I think you have a right to examine this witness with reference to that conversation, whether it took place on one day or another day, if it is a mere question as to time." Mr. Hurlburt: "Well, we do not limit ourselves to that. We say the conversation testified to by Croy never took place; but we say that there was a conversation between Kimball and Croy at a time other than what Croy states, and from that conversation that Croy has distorted the conversation, and has testified and has given a distorted version of that conversation upon the stand."

The court excluded the testimony. Mr. Hurlburt said, "I suppose we have stated it fully enough?" Mr. Moulton added, "We claim that we have a right to have the jury listen to this conversation, and say whether that is the one that Croy has incorrectly detailed."

It thus appears that the offer was to show a conversation between Kimball and Croy at another place, several weeks earlier, and at a time before the alleged conspiracy was entered

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into. If a new trial were to be granted on account of the exclusion of this testimony, it would be in order to allow the defendants to introduce testimony which, for all that we know, might prove to be entirely immaterial and unimportant. No statement was made at the trial which enables us to see that the offered testimony would have any significance. The counsel, being well aware of the rule, (see *Crowley* v. *Appleton*, 148 Mass. 98, 100,) obviously had a misgiving as to this, and no doubt made their statement as strongly as the facts would warrant. The object of allowing a bill of exceptions is to enable us to see if any legal error producing harm to a party was committed at the trial. It has accordingly often been said that exceptions to the exclusion of testimony will not be sustained, unless enough appears to show to this court what the testimony was expected to be, and that it was material. We are reluctant to apply this rule in cases where we have no real doubt what the party offering the testimony expected to prove, even although it is not distinctly stated. In the present case, we are wholly in the dark as to what the counsel for the defence expected Kimball to testify to. We are unable to see that the excluded testimony would probably have been favorable to him. Not enough was stated to enable us to infer that the testimony of Croy was a distorted version of another conversation upon the same subject; and the distance of time makes this theory improbable. The exclusion of the evidence, therefore, furnishes no ground for a new trial. *Crowley* v. *Appleton*, 148 Mass. 98. *Smethurst* v. *Barton Square Church*, 148 Mass. 261. *Farnum* v. *Pitcher*, 151 Mass. 470.

10. The questions put in cross-examination to the defendant Cate as to the public talk about the defendant Smith's connection with the granting of the licenses were properly allowed.*

* Upon the cross-examination of Cate the district attorney asked him the following questions:

"*Q.* Rightly or wrongly, there was a good deal of public talk and excitement in Haverhill after the first lot of licenses was granted? *A.* Yes.

"*Q.* Whether it was right or wrong? *A.* Yes, sir.

"*Q.* Mr. Pinkham leaving the board and saying what he did made a good deal of excitement? *A.* Yes, sir.

"*Q.* And Smith's name in connection with these licenses was the matter of common public talk, was n't it, if you heard it? *A.* I heard it mentioned a few times."

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The time referred to was after April 16, and apparently before April 21, while the alleged conspiracy was in full force. Cate's knowledge of what was publicly said of Smith bore directly upon Cate's own conduct in being with him, and going to Boston on April 21, on Smith's invitation, to visit the Italian quarter, and this was the aspect directly presented by the cross-examination. The evidence was not admissible to affect Smith, but was admissible to affect Cate.

11. The objection most relied on by the defendants is as to the ruling of the court requiring the several defendants, while testifying in their own behalf, to answer the questions whether they did not refuse to testify before the grand jury on the ground that they might thereby criminate themselves. But this objection also is unavailing.

It was within the constitutional right of the several defendants, when testifying before the grand jury, to refuse to answer questions on that ground. Declaration of Rights, art. 12. By Pub. Sts. c. 169, § 18, cl. 8, it is provided: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him." This provision of statute does not in terms include an investigation before the grand jury, which cannot be considered as a trial. But it may be assumed that the provision of the Constitution needs no statute to reinforce it in this particular, and that the refusal to testify before the grand jury could create no presumption against the defendants, whether the above statute applies or not. This means, no presumption upon which a legal judgment or consequence could rest. Magistrates and courts in their official action must give no weight to it. One who avails himself of his constitutional privilege, and refuses to accuse or furnish evidence against himself, shall be subject to no injurious consequence under the law by reason of his having done so. The Constitution and laws do not and could not assume to say that no unfavorable private opinion should be formed. The protection afforded by the Constitution is that the individual shall not be prejudiced at law by his silence, if he keeps silent.

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This protection, like other constitutional rights and privileges, (e. g. the right of trial by jury, *Parker* v. *Nickerson*, 137 Mass. 487, 492, and *Dole* v. *Wooldredge*, 142 Mass. 161, 179,) may be waived. If an ordinary witness, who is not a party to a cause, knowing that he is not bound to testify concerning a fact which may tend to criminate himself, voluntarily answers in part, he waives his privilege, and may be fully cross-examined. *Foster* v. *Pierce*, 11 Cush. 437. *Commonwealth* v. *Price*, 10 Gray, 472, 476. *Commonwealth* v. *Pratt*, 126 Mass. 462. And by universal consent, if one under indictment avails himself of a statute allowing him to testify, and voluntarily becomes a witness in his own behalf, he waives his constitutional protection, to a certain extent at least. He is not bound to testify. He may remain silent relying on the statutory provision that his neglect or refusal to testify shall not create a presumption against him. But if at his own request he becomes a witness in his own behalf, he takes an oath to tell the whole truth. In this Commonwealth, the cross-examination is not restricted to matters inquired of in chief. He may be cross-examined like other witnesses. He may be questioned as to all incriminating circumstances, and he must answer all such questions as are relevant to the subject of the charge against him. Whatever he has said or done, or omitted to say or do, which is relevant, may be inquired into. By taking the stand as a witness, he has consented and offered to submit to such inquiry; and he must testify to whatsoever has a legitimate bearing upon the question of his guilt. This has often been held in this State, as well as elsewhere. *Commonwealth* v. *Lannan*, 13 Allen, 563. *Commonwealth* v. *Mullen*, 97 Mass. 545. *Commonwealth* v. *Bonner*, 97 Mass. 587. *Commonwealth* v. *Gorham*, 99 Mass. 420. *Commonwealth* v. *Morgan*, 107 Mass. 199. *Commonwealth* v. *Nichols*, 114 Mass. 285. *Commonwealth* v. *Tolliver*, 119 Mass. 312. *Commonwealth* v. *Sullivan*, 150 Mass. 315. *Commonwealth* v. *Moore*, 162 Mass. 441. See also *State* v. *Witham*, 72 Maine, 531; *State* v. *Ober*, 52 N. H. 459; *People* v. *Tice*, 131 N. Y. 651; *S. C.* 15 Lawyer's Ann. Rep. 669, and note by Greene; *Disque* v. *State*, 20 Vroom, 249; *Spies* v. *People*, 122 Ill. 1,235. He can be attacked, impeached, discredited, like other witnesses, by being confronted with evidence of former convictions of crimes, of previous incon-

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sistent statements or acts, or of bad reputation for truthfulness. Pub. Sts. c. 169, §§ 18, 19. *Commonwealth* v. *Bonner*, *Commonwealth* v. *Gorham*, and *Commonwealth* v. *Sullivan*, *ubi supra*.

The defendants, however, contend that this rule, although it may be true as a general proposition, is not applicable to the facts of this case. The particular question now presented is, whether one under indictment, and voluntarily testifying in his own behalf on his trial, must disclose the fact that, when an involuntary witness before the grand jury which was investigating the same matter, he refused to answer on the ground that he might criminate himself. It is contended that this is a fact of no probative force against him, being merely an assertion of his constitutional right; and that by testifying afterwards he did not waive the protection of the Constitution as to this fact, which stands on special grounds, peculiar to itself.

We are unable to assent to either of these views. We have no occasion at this time to enter upon the consideration of the question whether such refusal to answer could have any legitimate bearing upon the general question of the guilt or innocence of the accused; that is, whether it could be regarded as in the nature of an implied admission of guilt. The presiding judge in his instructions to the jury expressly excluded this view, and limited the effect of the refusal to its bearing upon the credit to be given to the witness. He ruled in effect that, where a defendant now testifies that he is innocent of a criminal charge, the fact that he has heretofore refused to answer in relation to the subject on the ground that his answers might tend to criminate him may be considered as bearing upon the credibility of his present testimony. The defendant in such case now says that he is innocent. He formerly did not say that he was innocent, but that he would not answer lest he might criminate himself. This fact, though open to explanation, has some tendency to throw a doubt upon the truth of his present testimony, and thus has some bearing upon one material question, namely, the truthfulness of the witness.

Nor can we assent to the doctrine that the waiver by the defendant of his constitutional protection is only partial. By becoming a witness, he throws away his shield. He voluntarily accepts the position, and requests the privilege of testifying in

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his own behalf. If he remains silent, the law jealously guards and preserves his rights, cuts off all injurious comments, and as far as possible protects him from unfavorable inferences. *Commonwealth* v. *Harlow*, 110 Mass. 411. *Commonwealth* v. *Maloney*, 113 Mass. 211. *Commonwealth* v. *Nichols*, 114 Mass. 285, 287. *Emery's case*, 107 Mass. 172. *Commonwealth* v. *Scott*, 123 Mass. 239. *Commonwealth* v. *Hanley*, 140 Mass. 457. If, however, he seeks the benefit of testifying, he cannot stop short with matters which are favorable to himself, but must submit to be questioned also as to relevant matters which are adverse.

We cannot adopt the view taken in Cooley, Const. Lim. 317, and apparently in *State* v. *Bailey*, 54 Iowa, 414, that a defendant in an indictment who is testifying in his own behalf may stop at any point he chooses. An ordinary witness, who is not a party, has a right to stop when he is first questioned in respect to facts which may tend to criminate him; Taylor, Ev. § 1465; but a party under indictment who on his trial offers himself as a witness knows in advance that such questions are to be put, and that he is to testify as to his guilt or innocence, and he waives his constitutional protection in advance. *Commonwealth* v. *Nichols*, 114 Mass. 285. *Andrews* v. *Frye*, 104 Mass. 234. *Commonwealth* v. *Tolliver*, 119 Mass. 312.

On a review of the whole case, we find no error injurious to the defendants in the trial. *Exceptions overruled.*

LEWIS F. F. ABBOTT *vs.* VALENTINE DOANE, JR.

Suffolk. March 14, 1895. — April 6, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Promissory Note — Consideration.

If A. has refused or hesitated to perform an agreement with B. and is requested so to do by C., who will derive a benefit from such performance and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise.

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CONTRACT, upon a promissory note for $500, dated December 27, 1892, payable in three months after date to the order of the plaintiff, and signed by the defendant. The answer set up want of consideration. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. B. French, for the defendant.

H. L. Parker, Jr., for the plaintiff.

ALLEN, J. The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank, and left it unpaid at its maturity. The defendant, being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank.

It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait a while, but that the defendant's interests were imperilled by a delay, and indeed required that the note should be paid at once, and that the corporation, whose duty it was primarily to pay it, was without present means to do so. Since the defendant was sane, *sui juris*, was not imposed upon nor under duress, knew what he was about, and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it.

In this Commonwealth it was long ago decided that, even between the original parties to a building contract, if after having done a part of the work the builder refused to proceed, but afterwards, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised. *Munroe* v. *Perkins*, 9 Pick. 298. See also *Holmes* v. *Doane*, 9 Cush. 135; *Peck* v. *Requa*, 13 Gray, 407; *Rogers* v

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Rogers, 139 Mass. 440; *Hastings* v. *Lovejoy*, 140 Mass. 261, 265; *Thomas* v. *Barnes*, 156 Mass. 581. In other States there is a difference of judicial opinion, but the following cases sanction a similar doctrine. *Lattimore* v. *Harsen*, 14 Johns. 330. *Stewart* v. *Keteltas*, 36 N. Y. 388. *Lawrence* v. *Davey*, 28 Vt. 264. *Osborne* v. *O'Reilly*, 15 Stew. 467. *Goebel* v. *Linn*, 47 Mich. 489. *Cooke* v. *Murphy*, 70 Ill. 96. In England and in others of the United States a different rule prevails.

But when one who is unwilling or hesitating to go on and perform a contract which proves a hard one for him, is requested to do so by a third person who is interested in such performance, though having no legal way of compelling it, or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract.

Take an illustration. A. enters into a contract with B. to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B., but rather for the benefit of others; as, e. g., to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B. may be executed or executory; it may be money, or anything else in law deemed valuable; it may be of slight value as compared with what A. has contracted to do. Now A. is legally bound only to B., and if he breaks his contract nobody but B. can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A. is legally bound, the motive to perform the contract may be slight. If after A. has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B. may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A., by which A. agrees to do that which he was already bound by his contract with B. to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A. accordingly

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does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfil their promise. They have got what they bargained for, and A. has done what otherwise he might not have done, and what they could not have compelled him to do.

This has been so held in England, and the view is supported by English text-writers, though not always for precisely the same reasons. *Scotson* v. *Pegg*, 6 H. & N. 295. *Shadwell* v. *Shadwell*, 30 L. J. (N. S.) C. P. 145. Pollock, Con. (6th ed.) 175–177. Anson, Con. (4th ed.) 87, 88. Leake, Con. (3d ed.) 540. In this country the courts of several States have taken the opposite view, though in some instances the cases referred to as so holding, when examined, do not necessarily lead to that result. These cases are collected in the defendant's brief,* and in Williston's discussion of the subject in 8 Harv. Law Rev. 27.

Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A. has refused or hesitated to perform an agreement with B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise.

Exceptions overruled.

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* The American cases cited by the defendant are *Richardson* v. *Williams*, 49 Maine, 558; *Putnam* v. *Woodbury*, 68 Maine, 58; *Ellison* v. *Jackson Water Co.* 12 Cal. 542; *Ritenour* v. *Mathews*, 42 Ind. 7; *Gordon* v. *Gordon*, 56 N. H. 170; *Havana Press Drill Co.* v. *Ashurst*, 148 Ill. 115; *In re Goddard's estate*, 29 Atl. Rep. 634; *Baker* v. *Wahrmund*, 5 Tex. Civil App. 268; *Ford* v. *Garner*, 15 Ind. 298; *Reynolds* v. *Nugent*, 25 Ind. 328; *Brownlee* v. *Lowe*, 117 Ind. 420; *Newton* v. *Chicago, Rock Island, & Pacific Railway*, 66 Iowa, 422; *Vanderbilt* v. *Schreyer*, 91 N. Y. 392; *Seybolt* v. *New York, Lake Erie, & Western Railroad*, 95 N. Y. 562; *Robinson* v. *Jewett*, 116 N. Y. 40; *Sherwin* v. *Brigham*, 39 Ohio St. 137; *Wimer* v. *Worth Township*, 104 Penn. St. 317; *Johnson* v. *Sellers*, 33 Ala. 265; *Schuler* v. *Myton*, 48 Kans. 282; *L'Amoreux* v. *Gould*, 3 Seld. 349; *Merrick* v. *Giddings*, 1 Mackey, 394; *Davenport* v. *First Congregational Society*, 33 Wis. 387.

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ANNIE L. ASHCROFT, administratrix, *vs.* SIMON SIMMONS.

Suffolk. January 23, 1895. — April 12, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Evidence — Fraudulent Sale — Docket Entry — Return of Property and Assessment of Damages in Action of Replevin.

At the trial of an action of replevin it appeared that the plaintiff claimed title to the property under a mortgage, subsequently to the recording of which the property was attached by the defendant, a constable, as the property of the mortgagor, upon a writ in favor of a creditor of the mortgagor. On August 13, 1888, which was previous to the attachment and subsequent to the recording of the mortgage, the mortgagor sold and delivered the property to A. The defendant contended that the sale was made by the mortgagor in fraud of his creditors, and that A. participated therein. B., who testified that he was engaged in July and August, 1888, in the manufactory where the property was, was asked, "Did you see him [the mortgagor and vendor] around there?" He replied, "He was there nearly every day." There was evidence that after the purchase A. moved to another State, but there was no evidence that he had any knowledge that the vendor was around the manufactory after the purchase. The question and answer were admitted, in connection with other evidence, as tending to show the vendor's fraudulent purpose in selling the property, and not A.'s participation therein, which participation was found by the judge on other evidence. *Held*, that they were rightly admitted.

In an action of replevin, the judge, on March 9, 1894, found for the defendant, and by his direction the clerk made on the docket a memorandum of the finding. Twenty days thereafter a motion was made for the return of the goods and the assessment of damages, and the finding was amended by adding "and for the return of goods." The assessment of damages was postponed until the following June, neither party objecting, but the plaintiff not consenting, except by silence. In July following, when the question of assessment of damages was argued, the plaintiff objected, on the ground that the judge had then no authority to assess them. The judge overruled the objection, and assessed damages on July 25 as of the preceding March 29; and the plaintiff excepted. *Held*, that the original docket entry was in the nature of a memorandum rather than of a final judgment, and that it was competent for the judge at a later stage, upon motion of the defendant, to order a return and assess the damages.

REPLEVIN of furniture. After the former decisions, reported 151 Mass. 497 and 159 Mass. 203, the case was tried in the Superior Court, without a jury, before *Aldrich*, J., who allowed a bill of exceptions in substance as follows.

The plaintiff claimed title to the property under a mortgage which was duly executed and recorded. Subsequently to the

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recording of the mortgage, the property was attached by the defendant, in his capacity of constable, as the property of one Bird, who was the mortgagor, upon a writ in favor of a creditor of Bird, and wherein Bird was sole defendant. After the property was attached by the defendant, no demand was made upon him or the attaching creditor by the plaintiff or her intestate as mortgagee, conformably to the provisions of Pub. Sts. c. 161, § 75. There was uncontradicted evidence that on August 13, 1888, which was previous to the attachment, and subsequent to the recording of the mortgage, Bird sold and delivered the property to one Estes. The defendant contended that the sale was made by Bird in fraud of his creditors, and that Estes participated in the fraud. One Oliver, called by the defendant, testified that he was engaged in July and August of 1888 in the manufactory where the property was. The following question was asked him by the defendant: "Did you see Bird around there?" meaning if he saw Bird around the manufactory. This question was objected to by the plaintiff, so far as it was intended to refer to a period later than August 13, 1888. The judge overruled the objection, and the plaintiff excepted. The answer was, "He was there nearly every day." There was evidence that, after purchasing the property, Estes went to Maine, where he resided, but there was no evidence introduced or offered that Estes had any knowledge or information that Bird was ever around the manufactory after he, Estes, purchased the property. The question and answer were admitted as competent, in connection with other evidence, as tending to show Bird's fraudulent purpose in selling the property to Estes, and not for the purpose of showing the participation of Estes in the fraud; the fraudulent participation of the latter in the fraudulent sale being found by the judge upon other evidence not objected to. The judge found for the defendant solely on the ground that the sale to Estes was fraudulent as against Bird's creditors, and that Estes participated in the fraud.

The judge found for the defendant on March 9, 1894, and directed the clerk to make on the docket a memorandum of his finding, which the clerk then did. On March 29, 1894, a motion was made for the return of the goods and the assessment of damages, and on the latter date the finding was amended by

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adding "and for the return of goods"; and the assessment of damages was, for want of time or by reason of other engagements on the part of the judge, postponed until the following June, neither party then objecting, but the plaintiff not consenting, unless his silence was consent. In July, 1894, the judge heard the parties upon the question of assessment of damages, the plaintiff then objecting, and asking the judge to rule that he then had no authority to assess damages. The judge overruled the objection, and ruled that he then had authority to assess damages. The plaintiff duly excepted. The judge assessed damages on July 25, 1894, in the sum of $498.66, as of March 29, 1894; and the plaintiff alleged exceptions.

N. D. A. Clarke, (*J. R. Baldwin* with him,) for the plaintiff.

G. E. Curry, (*A. P. Worthen* with him,) for the defendant.

MORTON J. We understand the evidence that was objected to, but admitted, to mean that after the sale Bird was around the manufactory exercising acts of control. We also understand that after the purchase Estes went to Maine, where he resided, and stayed there. The fact, if it was a fact, that after the alleged sale Estes went away, and Bird was in possession, would be admissible on the general question whether the sale was in fraud of Bird's creditors; *Wheeler* v. *Train*, 3 Pick. 255; *Ingalls* v. *Herrick*, 108 Mass. 351; and that would necessarily include the question of an intent on Bird's part, as well as participation in the fraud on the part of Estes. We cannot say that the limitation by the court of the admissibility of the testimony to its competency, in connection with other evidence, of which that relating to the absence of Estes may have been a part, to show Bird's intent, was erroneous. Ordinarily, in the absence of anything to the contrary, it is to be inferred without direct evidence that the owner of property knows who exercises control over it. The statement in the bill of exceptions that "there was no evidence introduced or offered that Estes had any knowledge or information that said Bird was ever around said manufactory after he, said Estes, purchased said property," we construe as meaning that no direct evidence was introduced or offered, and we do not understand that the natural inferences growing out of Estes's ostensible ownership of the property are to be excluded. The case, therefore, does not fall

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within the rule which excludes evidence of the subsequent acts and declarations of a vendor to defeat the title of the vendee on the ground that the sale was a fraudulent one.

The entry which the clerk made upon the docket by direction of the judge who tried the case was in the nature of a memorandum of his decision upon the question which party was entitled to prevail, rather than of a final judgment; and it was competent for the court at a later stage, upon motion of the defendant, to order a return and to assess the damages. *Whitwell* v. *Wells*, 24 Pick. 25, 33. *Simpson* v. *M'Farland*, 18 Pick. 427, 431. *Wheeler* v. *Train*, 4 Pick. 168. *Davis* v. *Harding*, 3 Allen, 302. *Exceptions overruled.*

ANNIE OVINGTON *vs.* LOWELL AND SUBURBAN STREET RAILWAY COMPANY.

Middlesex. January 18, 1895. — May 21, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Negligence — Municipal Ordinance — Evidence.

A street railway company which, after a storm, is engaged in removing snow from its tracks in a city street, using therefor, by permission of the superintendent of streets, snow ploughs which heap the snow at the side of the tracks, is not liable, in the absence of evidence that the work was done negligently, or by improper methods, or that the snow was unnecessarily piled up in the street and not seasonably removed, for injuries occasioned to a traveller on the sidewalk who was struck by a horse belonging to a third person, which, on entering the street where the tracks were from a side street, ran into the pile of snow, tipped over the sleigh to which it was attached, escaped from the control of the driver, and ran away.

The Lowell Horse Railroad Company, which, under an ordinance of the city of Lowell, was forbidden under certain conditions to use snow ploughs on its tracks in that city, or to remove snow therefrom, without consent first being obtained of the mayor, or of the superintendent or chairman of the committee on streets, and the Lowell and Dracut Street Railway Company, having under the provisions of St. 1890, c. 163, been consolidated into the Lowell and Suburban Street Railway Company, the consolidated company, though subject, under the operation of the statute, to the provisions of the ordinance, may, with the consent of the superintendent of streets, lawfully remove snow from its tracks in Lowell by means of ploughs or otherwise.

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Parol evidence of an agreement between the manager of a street railway company and the superintendent of streets of a city, permitting the company to remove snow from the streets with snow ploughs, is competent, where it appears that the written agreement has been mislaid and cannot be produced.

TORT, for personal injuries occasioned to the plaintiff, a traveller on the highway by being struck by a runaway horse which escaped from its driver through the alleged negligence of the defendant.

Trial in the Superior Court before *Sheldon*, J., who directed a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

P. J. Hoar, for the plaintiff.

F. E. Dunbar, for the defendant.

BARKER, J. The plaintiff was not a passenger, and was not injured by any vehicle or animal owned by the defendant or under its control, nor upon its tracks, but was struck while upon the sidewalk by a runaway horse and sleigh belonging to a third person, and of which no one was in control at the time. The contention that the defendant is answerable for the plaintiff's injury is upon the ground that the horse escaped from the control of its driver because of unlawful or negligent acts of the defendant. We assume that, if there was evidence from which the jury might have found that the horse so escaped, they could render a verdict for the plaintiff, if they thought her in the exercise of due care. See *McDonald* v. *Snelling*, 14 Allen, 290. But we think a verdict was rightly ordered for the defendant, for the reason that the jury could not properly find from the evidence that the horse escaped from control by any fault of the defendant.

The injury was on February 23, 1893. A great snow storm had prevailed on the day before, and on that day it snowed very hard, making the snow about two feet deep on a level. The defendant's tracks were in Lakeview Avenue, into which Aiken Street enters at right angles. The only witness who described the escape of the horse, testified that she saw a horse and sleigh coming pretty fast around the corner of Aiken Street and Lakeview Avenue, driven into the snow-pile at that place, and the

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driver trying to do all he could to hold the horse, but being unsuccessful; that the sleigh finally tipped over and the men were thrown out in the snow, and the horse with the sleigh, which by this time was bottom up, ran on to the sidewalk, and, running away and going very rapidly, struck the plaintiff. The same witness and other witnesses testified that during the storm and on the day of the accident the defendant had men and teams and electric and horse ploughs working all the time on Lakeview Avenue and at the place of the accident; that they threw and piled up snow all this time on both sides of the track in the part of Lakeview Avenue where the sidewalk on to which the horse ran was located; and that they were carting away snow, and that on the day of the accident the snow was about as high as her head, she being more than five feet high. The general manager of the defendant testified that at the time of the accident the defendant had not cleared out Aiken Street, nor Lilly Avenue, which entered Lakeview Avenue opposite Aiken Street; that the storm was the worst since the blizzard of 1888; and that south of the south rail of the north track the snow in Lakeview Avenue was undisturbed by the defendant, the distance from that rail to the south curbing being nineteen feet. The same witness testified, in substance, that the defendant had an agreement with the city, made by the witness and the superintendent of streets, as to the removal of snow from the tracks of the defendant for that season, and that the defendant was permitted to use either horse or electric ploughs, and to take off snow as soon as practicable, the city to dispose of the snow on certain streets.

This is the substance of all the testimony as to the condition of the street, the acts of the defendant in interfering with the snow, and the circumstances under which the runaway horse got free from its driver and ran upon the sidewalk. At the argument in this court, the plaintiff's counsel relied upon c. 24 of the Ordinances of the City of Lowell of 1883, making regulations to be observed by the Lowell Horse Railroad Company, which provides that, when snow falls of a sufficient depth for sleighing, no snow plough shall be allowed to pass over the track of said company, or any part thereof; and that the company shall not at any time cause or allow snow or ice to be removed

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from their tracks, or any part thereof, without consent being first obtained of the mayor, or of the superintendent or the chairman of the committee on streets.

We assume that the Lowell Horse Railroad Company was the corporation chartered by St. 1863, c. 172, and concerning which were passed the Sts. 1864, c. 261; 1873, c. 171; 1875, c. 147; and 1887, c. 182; and that under the provisions of St. 1890, c. 163, it has been consolidated with the Lowell and Dracut Street Railway Company into the corporation which is the defendant in this case; and that under the operation of the statute last cited the defendant is subject to the provisions of the city ordinances referred to. We do not construe that ordinance wholly to prohibit the use of snow ploughs by the company, and we are of opinion that under its provisions the defendant, with the consent of the superintendent of streets given in the agreement which was in evidence, could lawfully remove the snow from Lakeview Avenue by means of ploughs and otherwise. It is perhaps questionable whether, upon the evidence, the horse was rendered uncontrollable by coming into the pile of snow at the corner of the street, but we assume that the jury could so find. Assuming that they could also find that the pile of snow was due to the operations of the defendant in clearing snow from the street, we are of opinion that, having reference to the magnitude of the storm, the evidence does not justify a finding that the inequality of surface which caused the overturn of the sleigh, was due to the negligence of the defendant. The storm was protracted and severe, and the depth of snow unusually great. The operation of removing the snow necessarily took considerable time and caused inequalities in height during the process. The work of removal could not be so done as to avoid such inequalities. The storm had continued until an earlier hour of the same day, and the work of removal was still in progress when the accident occurred. There was no evidence that the corporation pursued the work recklessly, or by improper methods. The work was going on all the time, and was prosecuted with all ordinary means; and as the work itself was lawful, it was incumbent upon the plaintiff to prove that it was negligently performed. That during the process of removal piles of snow were heaped up in the street is all that the evidence discloses

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tending to show that the work was negligently done. This without evidence that the heaping up of the snow was unnecessary, or that the work could have been done in some other manner, was not enough to charge the defendant with negligence. If the heaps were not removed within a reasonable time, the burden of showing that fact was upon the plaintiff, and it could not be properly found from the evidence.

Parol evidence of the agreement with the superintendent of streets as to the use of snow ploughs and the removal of snow was competent. There is no reason shown why such an agreement should be in writing, and there was evidence, the effect of which was for the court, tending to show that so much of the agreement as had been put into writing had been mislaid and could not be produced. *Exceptions overruled.*

BERTRAM S. CLOUTMAN & another *vs.* INHABITANTS OF CONCORD.

Suffolk. March 12, 1895. — May 21, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Taxes — Place where Business is carried on.

Partners whose principal place of business is in the city of B. cannot be taxed in the town of C. as the place where their business is carried on, within the meaning of Pub. Sts. c. 11, § 24, from the fact that, by a contract with the superintendent of the State Reformatory in C., they transact business there wholly incident to work done by the State and in a place under its exclusive control.

HOLMES, J. This is an action to recover taxes paid under protest. The only question raised by the defendant's exceptions is whether Concord was "the place where [the plaintiffs'] business was carried on," within Pub. Sts. c. 11, § 24, so that the plaintiff firm could be taxed there. The plaintiffs were partners, dealing in boots and shoes in the wholesale and jobbing trade. Their principal place of business was in Boston. All that they did in Concord was done in connection with a contract between them and the superintendent of the Reformatory there for the labor of prisoners in making shoes. It is unnecessary

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to consider the terms of this contract particularly, as we are all agreed that if the work of the prisoners was the only work done for the plaintiffs in Concord the case would fall within the principle of *Little* v. *Cambridge*, 9 Cush. 298. That case decided that a place where work is done for a firm by independent contractors is not a place where the firm's business is carried on. This contract was for independent work, from the nature of the case. Whatever otherwise might have been its effect, the prisoners, whose labor was said to be employed by the firm, remained under the control of the superintendent, who contracted with the plaintiffs.

The plaintiffs, however, in pursuance of their contract, employed eight or ten cutters and a foreman, not prisoners, who worked exclusively at the Reformatory cutting stock for the prisoners to make up into boots and shoes. They kept a record there of the stock received and of the goods shipped, had one private drawer in the desk there, and they paid their men there. The question is whether these facts warrant a different conclusion.

It is a question of degree. It may be conceded, for the purposes of argument, that the plaintiffs might have a place of business in Concord without having the exclusive occupancy or the control of a foot of land. But the plaintiffs' business was wholly incident to work done by the State, as well as done in a place under the exclusive control of the State. It consisted merely in cutting the leather for the prisoners, and the keeping of the necessary accounts in connection with their work. The prisoners' work was under an independent contractor. As we have said, it was not business of the plaintiffs. If the plaintiffs merely had forwarded the leather, all would agree that that did not make them liable to taxation. We are of opinion that the cutting does not go to the height of making a place of business, but is to be treated as an incident of the State's work under the contract with the State. We take the words "place of business" in the ordinary popular sense of the words. In a popular sense, we think that no one would say that the plaintiffs had a place of business in the Reformatory. See *Farwell* v. *Hathaway*, 151 Mass. 242. *Exceptions overruled.*

J. R. Smith, (*P. Keyes* with him,) for the defendant.

J. L. Thorndike, for the plaintiffs.

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ATTORNEY GENERAL *vs.* JOHN E. SULLIVAN.

Middlesex. April 1, 1895. — May 21, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Information in the Nature of a Quo Warranto — Right to Trial by Jury — Constitutional Law.

The defendant in an information in the nature of a *quo warranto* brought to try his title to the office of president of the common council of a city has no constitutional right to a trial by jury.

FIELD, C. J. This is an information in the nature of a *quo warranto* to try the title of the defendant to the office of president of the common council of the city of Lowell, and the single question before us is whether the defendant is as of right entitled to a trial by jury.

So far as we know, the first time the words "*quo warranto*" are found in the statutes, whether of the Colony, Province, or Commonwealth, is in the Rev. Sts. c. 81, § 5, wherein the Supreme Judicial Court is given power "to issue writs of error, certiorari, mandamus, prohibition, and *quo warranto;* and all other writs and processes to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the laws." This provision is now found in Pub. Sts. c. 150, § 3. Of this section in the Revised Statutes the Commissioners say, "This power has always been exercised by the Supreme Judicial Court, though not expressly mentioned in the statutes." Commissioners' Report, c. 81, § 5, notes.

No form of the writ of *quo warranto* has ever been prescribed in this Commonwealth. So far as we know, an information in the nature of a *quo warranto* is first mentioned in our statutes in St. 1851, c. 233, §§ 55–64. This statute was repealed by St. 1852, c. 312, and §§ 42–50 of said last named statute substituted therefor. See Pub. Sts. c. 186, §§ 17–25. These sections in St. 1852, c. 312, empowered any person whose private right or interest has been injured or is put in hazard by the

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exercise by a private corporation, or by persons claiming to be a private corporation, of a franchise or a privilege not conferred by law, to apply to the Supreme Judicial Court for leave to file an information in the nature of a *quo warranto*, and they regulated the proceedings. Both the writ of *quo warranto* and the information in the nature of a *quo warranto* were common law processes. The writ was an original writ issued out of chancery, and was regarded as a writ of right on the part of the Crown, and was exclusively a civil process. The information in the nature of a *quo warranto* was originally a criminal proceeding in which, if the issue was found against the defendant, in addition to a judgment of ouster a fine might be imposed. The colonists of Massachusetts were familiar with the writ of *quo warranto*, and were in great fear that their charter would be seized into the King's hands on such a writ, and the writ was actually issued and served upon the officers of the Colony, a copy of which is found in 5 Mass. Col. Rec. 421. This writ was not prosecuted, and the Charter was subsequently cancelled on *scire facias* in chancery.

From such investigation as we have been able to make, we cannot find that the writ of *quo warranto* was ever actually used in the Colony, Province, or Commonwealth. There were no private business corporations in the Colony or Province until near the time of the Revolution, and perhaps only one private corporation of any kind in Massachusetts before the year 1772, namely, that of Harvard College. See, for acts of incorporation in 1772, 5 Prov. Laws, (State ed.) 177–179. The municipal corporations of towns and the parishes were always subject to the control of the Legislature, and they bore little resemblance to the cities and boroughs in England, and neither the writ nor the information has ever been used here to try the title of the inhabitants to their municipal franchises, although the question whether either proceeding can be used for such a purpose has never been decided. See *Attorney General* v. *Salem*, 103 Mass. 138; *State* v. *Bradford*, 32 Vt. 50. There were no ecclesiastical corporations here, in the English sense of that term. There was therefore probably nothing in the Colony or Province which could be brought within the reach of a writ of *quo warranto*, or of an information in the nature of a *quo war-*

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ranto, except the public offices. Whether the information in the nature of a *quo warranto* was used during the Provincial period to try the title to public offices we have no knowledge, as only a partial search of the records has been made. The earliest printed reports of cases decided since the adoption of the Constitution show a familiarity on the part of the judges with an information in the nature of a *quo warranto* to try the title to a public office, and apparently the judges at first followed the practice in England under St. 9 Anne, c. 20, which did not in terms extend to the Colonies. See *Commonwealth* v. *Athearn*, 3 Mass. 285; *Commonwealth* v. *Smead*, 11 Mass. 74.

At common law the attorney general, *ex officio*, has the right either to sue out a writ of *quo warranto*, or to bring an information in the nature of a *quo warranto*, to try the title to a public office, and is not compelled to ask leave of the court; but no private individual at common law has a right to use the name of the attorney general for the purpose of suing out such a writ, or of bringing such an information. The practice of permitting a private individual to apply to this court for leave to file an information in the nature of a *quo warranto* rests, it seems, in this Commonwealth, upon statute. This is explained in *Goddard* v. *Smithett*, 3 Gray, 116. In that case the court say: "There is, and always has been, in this Commonwealth, an authority in the attorney and solicitor general, as incident to the office, to file informations *ex officio* in the name and behalf of the Commonwealth. The information is in its nature a prosecution for some offence against the government, by an application to a court of criminal jurisdiction, and is essentially a public criminal prosecution. When filed by the attorney general, it is done at his own discretion, according to his own view of the rights of the government, without leave of court, nor will the court direct or advise him on the subject." See *Commonwealth* v. *Allen*, 128 Mass. 308.

The English statutes on the subject may be found in Cole, Inform. 115 *et seq.*, and Shortt, Inform. 108 *et seq.* Our statutes concerning informations in the nature of a *quo warranto* have no application to the present case, as these statutes relate solely to private corporations, or to persons claiming to be a private corporation, and the Pub. Sts. c. 150, § 3, empowering

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this court to issue writs, relates to writs of *quo warranto*, and not to informations in the nature of a *quo warranto*. The writ of *quo warranto* seems to have become obsolete in England before our Revolution, and from the precedents here, so far as we know, an information in the nature of a *quo warranto* instead of a writ has uniformly been used. The Pub. Sts. c. 150, § 3, however, should, we think, be interpreted to authorize proceedings in the form of an information in the nature of the writ. See *State* v. *Leatherman*, 38 Ark. 81; *People* v. *Keeling*, 4 Col. 129; *State* v. *West Wisconsin Railway*, 34 Wis. 197; *State* v. *Gleason*, 12 Fla. 190; Spelling, Ex. Relief, § 1768 *et seq.*

The question of the constitutional right of the defendant to a trial by jury has been argued in the present case. There is, however, no statute prescribing the procedure, and no statute intimating whether in such a case as this the defendant has or has not a right to a trial by jury, and therefore no question of the constitutionality of a statute is involved in the case.

In Pub. Sts. c. 186, § 22, the attorney general is authorized to intervene in certain cases, and to demand "a judgment of fine and forfeiture," which seems to indicate that informations under this chapter are still regarded as of a criminal nature; and this is also intimated in the opinion in *Goddard* v. *Smithett*, *ubi supra*. In *Commonwealth* v. *Fowler*, 11 Mass. 339, which was an information at common law, the judgment is a judgment of ouster without a fine. See *Campbell* v. *Talbot*, 132 Mass. 174. In many of the States of this country the information in the nature of a *quo warranto* is now regarded as a purely civil proceeding. *Ames* v. *Kansas*, 111 U. S. 449, 460. It has been made so in England by St. 47 & 48 Vict. c. 61, § 15. If the present information must be considered as a criminal proceeding, undoubtedly the defendant is entitled to a trial by jury. But if it is a civil proceeding, the rights of the defendant are not so clear. Mr. Dane, 6 Abr. c. 186, art. 13, in speaking of *quo warranto* informations, says: "The law upon this subject has been very imperfectly settled by American decisions; no one is recollected in the Federal courts, and but few have been made in the State courts. The want of such is the less to be regretted; for it is believed there are few or no American statutes on this subject of informations, in the nature of the old writ of *quo warranto*,

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(though there are sundry American statutes concerning informations on the penal statutes for the recovery of statute penalties,) and therefore common law principles govern mainly." The earliest Massachusetts case cited by him is *Commonwealth* v. *Athearn*, 3 Mass. 285. In speaking of the cases in New York, and of Sts. 4 & 5 W. & M., c. 18, and 9 Anne, c. 20, he says that, if these statutes "have not been adopted in Massachusetts, and no evidence is found to show they have been, these *quo warranto* informations are wholly at common law." See *People* v. *Richardson*, 4 Cowen, 97 and note.

As this court by statute has ceased to have original jurisdiction over crimes, if the present information is to be entertained by this court, we think it must be under the statute authorizing the court to issue writs of *quo warranto*, and that the information should be regarded as a substitute for a writ of *quo warranto*, and therefore as exclusively a civil proceeding. A criminal information at common law is not at the present time within the general jurisdiction of this court, because it is not a court of general original criminal jurisdiction. We need not consider what is the nature of informations brought under Pub. Sts. c. 186, § 17 *et seq.*, as these are specially authorized by the statutes.

The English practice in informations of this character, so far as they were brought under statutes passed after the colonization of Massachusetts, do not seem to us very material, as these statutes did not extend to the Colonies, and were not, so far as we know, ever adopted in Massachusetts. The practice in England, however, at common law as well as under the statutes, both in writs of *quo warranto* and in informations in the nature of a *quo warranto*, we think, always has been to try issues of fact in the country by a jury since juries were established, and this is true of many of the States of this country. Bracton's Note Book, 241, 862, 1666. Keilw. 151, pl. 47, 48, 49; 152, pl. 54. 1 Co. Inst. 155 (*a*), 155 (*b*). *The Abbot of Strata Mercella's case*, 9 Co. Rep. 40. *Attorney General* v. *Farnham*, Hardres, 504. 3 Nelson, Abr. 42. *Rex* v. *Bennett*, 1 Strange, 101. 14 Petersdorf, Abr. 97 *et seq.* St. 18 Edw. I., 2 Co. Inst. 494, 495. *Rex* v. *Higgins*, T. Raym. 484. *Darell* v. *Bridge*, 1 Wm. Bl. 46. *Rex* v. *Cambridge*, 4 Burr. 2010. *The King* v. *Francis*, 2 T. R.

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484. *The King* v. *Mein*, 3 T. R. 596. *People* v. *Richardson*, 4 Cowen, 97, 100, note. *United States* v. *Addison*, 6 Wall. 290. *People* v. *Albany & Susquehanna Railroad*, 57 N. Y. 161. *Buckman* v. *State*, 24 Law. Ann. Rep. 806, note; 34 Fla. 48. *Van Dorn* v. *State*, 34 Fla. 62. *People* v. *Sackett*, 14 Mich. 243. *People* v. *Doesburg*, 16 Mich. 133. *Harbaugh* v. *People*, 33 Mich. 241. *Donnelly* v. *People*, 11 Ill. 552. *Wight* v. *People*, 15 Ill. 417. *Hay* v. *People*, 59 Ill. 94. *People* v. *Golden Rule*, 114 Ill. 34. *People* v. *Rensselaer & Saratoga Railroad*, 15 Wend. 113; 30 Am. Dec. 33, and note.

The Declaration of Rights in our Constitution, art. 15, secures the right of a trial by jury in all controversies concerning property, and in all suits between two or more persons, except in cases in which theretofore it had been otherwise used and practised.

Without considering whether a suit or information to declare forfeited the charter of a private corporation would not be held to be a controversy concerning property within the meaning of this article, we are of opinion that a public office, such as that of president of the common council of the city of Lowell, is not property within the meaning of this article. *Attorney General* v. *Jochim*, 99 Mich. 358. Neither do we think that the present information is a suit between two or more persons within the meaning of this article, because the attorney general represents the Commonwealth. This defendant therefore has no constitutional right to a trial by jury. There is no statute conferring upon him any such right, unless it be the statute which empowers this court to issue writs of *quo warranto*. There was no established practice in Massachusetts, so far as we know, in cases of this kind, at the time of the adoption of the Constitution, and writs of *quo warranto* had then become obsolete in England. We have no doubt that the Legislature could provide for the determination of the validity of an election contest such as this by other methods than by a jury trial, and in leaving such a contest to this court to be determined on a writ of *quo warranto*, or on an information which we regard as a substitute for such a writ, we are of opinion that the Legislature did not mean necessarily to confer upon a defendant the right to a trial by jury, in cases where the Constitution did not require it.

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This view is supported by the following decisions, which turn more or less upon the provisions of the Constitution or of the statutes of the State where the controversy arose. *State* v. *Minnesota Thresher Manuf. Co.* 40 Minn. 213. *State* v. *Johnson*, 26 Ark. 281. *Wheat* v. *Smith*, 50 Ark. 266. *State* v. *Lewis*, 51 Conn. 113. *Ewing* v. *Filley*, 43 Penn. St. 384. *Hilliard* v. *State*, 100 Ala. 634. Whether it may not be in the discretion of the court to grant such trial in such an information as the present, we need not consider. In *Commonwealth* v. *Dearborn*, 15 Mass. 125, the original records show that there was a verdict of a jury, but it was ultimately held that the information would not lie; and it was not an information against public officers; and in *Commonwealth* v. *Tenth Massachusetts Turnpike Co.* 11 Cush. 171, issues were submitted to a jury, but this was an information to declare forfeited the charter of a private corporation. So far as we know, there has been no usage in this Commonwealth to try the title to a public office by a jury, and the Legislature has by various statutes taken from this court in great measure its original jurisdiction over actions which require a jury trial. The tendency of legislation is to confine jury trials to the Superior Court, except when issues are submitted to a jury in equity and probate appeals. The modern practice has been to try such an information as this without a jury, although it does not appear in the cases that a jury was demanded. *Commonwealth* v. *Allen*, 128 Mass. 308. *Commonwealth* v. *Swasey*, 133 Mass. 538. *Commonwealth* v. *Harriman*, 134 Mass. 314. *Attorney General* v. *Crocker*, 138 Mass. 214.

Exceptions overruled.

J. J. Hogan, (*W. A. Hogan* with him,) for the defendant.

F. W. Qua, for the plaintiff.

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COMMONWEALTH *vs.* MAURICE A. HAYDEN.

Suffolk. April 2, 1895. — May 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Grand Juror — Procedure — Evidence — Polygamy — Belief in the Death of a former Husband or Wife as a Defence.

A special police officer is not exempt from serving as a grand juror, nor would his exemption absolutely disqualify him from service.

A grand juror may testify before the grand jury of which he is a member without affecting either the validity of an indictment in another case presented at the same sitting of the court at which he testified, or the rights of the defendant therein.

A motion to dismiss is not the proper mode of raising either the question of the validity of an indictment presented by a grand jury of which a special police officer was a member, or the objection that a member of the grand jury testified before it in another matter at the same sitting of the court at which the indictment was presented, inasmuch as neither of the causes alleged in avoidance of the indictment are matters apparent on the record.

At the trial of an indictment for polygamy a writing, purporting to be a letter written to the mother of the defendant's first wife, signed by the defendant "A. B., your son in law," and identified as his handwriting, is competent evidence against him.

A marriage may be proved by the testimony of either of the contracting parties.

An attested copy of the record of a marriage from the records of the city registrar of Boston, certified to by the assistant registrar, is admissible in evidence.

At the trial of an indictment for polygamy, in proof of the defendant's unlawful marriage, the testimony of a witness who performed the ceremony that he was a clergyman in Boston, and an ordained minister and pastor of a Congregational church, and that he had been such pastor for many years, is at least competent to prove that he was *de facto* discharging the office of an ordained minister, and is competent circumstantial or presumptive evidence within the Pub. Sts. c. 145, § 31, from which the fact of marriage may be inferred.

An honest or reasonable belief in the death of a former husband or wife is not, in this Commonwealth, a defence to a prosecution for polygamy.

INDICTMENT, on Pub. Sts. c. 207, § 4, alleging that the defendant, on April 3, 1891, at Boston, was lawfully married to one Annie Dillon; and also that on September 2, 1894, at Boston, he unlawfully married one Emma M. Taylor.

At the trial in the Superior Court, before *Mason*, C. J., the defendant seasonably moved to dismiss the indictment assigning as causes therefor: 1. That the foreman of the grand jury which presented the indictment was a special police officer. 2. That

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a grand juror testified as a witness before the grand jury of which he was a member at the same sitting of the court at which this indictment was presented.

The motion was overruled, and the defendant excepted.

The first wife of the defendant, Annie Dillon, called as a witness by the government, testified that she was married to the defendant on April 3, 1891, and an attested copy of the record of her marriage to him from the records of the city registrar of Boston, certified to by the assistant registrar, and a writing, identified as the handwriting of the defendant, purporting to be a letter written by him to one Mrs. William Dillon, mother of Annie Dillon, of Kinsale, Ireland, signed by the defendant, "Maurice A. Hayden, your son in law," were introduced in evidence.

The government also put in the testimony of a witness who married the defendant to Emma M. Taylor, that he was a clergyman in Boston and an ordained minister and pastor of a Congregational church, and that he had been such pastor for many years. The defendant excepted to the admission of this testimony, on the ground that it was not competent to prove the ordination of the witness, or his authority to bind parties in marriage.

Emma M. Taylor testified that she was married to the defendant on September 2, 1894, and that she had read a letter dated February 28, 1894, received by the defendant from Mrs. William Dillon, stating that her daughter Annie Dillon was dead. Another witness testified that the defendant had told him that his first wife, Annie Dillon, was dead, and that he, the defendant, had received a letter from her mother in Ireland saying so.

The defendant requested the judge to rule: 1. That, if the jury are satisfied from the declaration of the defendant concerning the death of his first wife that he honestly believed that she was dead, they should return a verdict of not guilty. 2. That the declaration of the defendant that his first wife was dead established and sustained the presumption of innocence, and if the jury believed that he acted in good faith and in furtherance of such belief they should acquit. 3. That if the defendant at the time of contracting the second marriage had a *bona fide* and reasonable belief that his first wife was dead, he was entitled to an acquittal.

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The judge declined so to rule; and the jury returned a verdict of guilty.

The defendant alleged exceptions.

F. F. Sullivan, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

BARKER, J. 1. Special police officers are not exempt from service as grand jurors. Pub. Sts. c. 170, § 2. Nor does the fact that a juror is exempt absolutely disqualify him from service. He may be excused at his own election, or may be excepted to by any party, but, if he serves, the action of the grand jury or traverse jury is not made void. *Munroe* v. *Brigham*, 19 Pick. 368. See also *Wassum* v. *Feeney*, 121 Mass. 93; *Moebs* v. *Wolffsohn*, 143 Mass. 130.

2. There is neither authority nor reason for the contention that the indictment was void because one of the grand jurors appeared as a witness before the grand jury of which he was a member at the same sitting of the court at which the indictment was presented. A grand jury may properly act upon the personal knowledge of any of its members communicated to his fellows under no other sanction than the grand juror's oath. *Commonwealth* v. *Woodward*, 157 Mass. 516.

And there is no impropriety or wrong to the accused in having a grand juror who has personal knowledge as to matters inquired of by his grand jury sworn and testify as a witness. Indeed, there may under our practice be some incidental benefit to the accused in that course, as in that case his name will be found in the list of witnesses which is to be filed of record by the clerk. Pub. Sts. c. 213, § 9.

3. The motion to dismiss, by which alone the two questions above considered were raised, must also have been overruled for the technical reason that neither of the facts alleged in it as avoiding the indictment appeared upon the record of the cause, and so could not be availed of by a motion to dismiss. *Commonwealth* v. *Fredericks*, 119 Mass. 199, 204, and cases cited.

4. As the writing purporting to be a letter written and signed by the defendant was identified as his handwriting, it was competent evidence against him. *Stone* v. *Sanborn*, 104 Mass. 319, 324. *Wiggin* v. *Boston & Albany Railroad*, 120 Mass. 201.

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5. The testimony of Annie Dillon was competent to prove the defendant's marriage with her. The testimony of witnesses present at a marriage is competent to prove it; *Commonwealth* v. *Norcross*, 9 Mass. 492; *Commonwealth* v. *Littlejohn*, 15 Mass. 163; and this must be held to include the testimony of either of the contracting parties. *Commonwealth* v. *Dill*, 156 Mass. 226.

6. The attested copy of the record of the marriage of the defendant to Annie Dillon, from the records of the city registrar of Boston, certified to by the assistant registrar, was admissible in evidence. The records of town clerks relative to marriages are made by statute *prima facie* evidence in legal proceedings of the facts recorded, and a certificate signed by the clerk is made admissible as evidence of the record. Pub. Sts. c. 32, § 11. See also Pub. Sts. c. 145, § 29. Towns and cities of more than ten thousand inhabitants may choose a person other than the clerk to be registrar, and in that case the provisions concerning clerks apply to the registrar. By St. 1885, c. 266, § 5, the city registrar of Boston has power to appoint his own subordinates. General authority to make ordinances concerning registrars and registration is given by Pub. Sts. c. 32, § 18. By the Revised Ordinances of the City of Boston of 1885, c. 20, § 2, there are allowed to the city registrar for the discharge of the duties of his department three clerks for copying and three for recording. By St. 1892, c. 314, § 2, the city registrar is required to appoint from his subordinates two assistant city registrars, and the same section provides that the certificates and attestations of either assistant city registrar shall have the same force and effect as those of the city registrar. The result is, that the certificate of the assistant city registrar admitted in evidence under the defendant's exception was plainly competent.

7. In proof of the defendant's unlawful marriage charged in the indictment, the government was allowed, against his objection and exception, to put in the testimony of a witness who performed the ceremony, that he was a clergyman in Boston and an ordained minister and pastor of a Congregational church, and that he had been such pastor for many years. The defendant contends that the testimony of this witness was not compe-

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tent to prove his own ordination or his authority to bind parties in marriage. "A minister of the Gospel, ordained according to the usage of his denomination, who resides in the Commonwealth and continues to perform the functions of his office," may solemnize marriages. Pub. Sts. c. 145, § 22. Whether the usage of the Congregational denomination requires a record to be made of the ordination of a minister does not appear in this cause, and is not a matter of which we have judicial knowledge. The evidence was at least competent to prove that the witness was *de facto* discharging the office of an ordained minister, and, under the peculiar statute regulating the proof of marriages in court, the testimony so excepted to was all "circumstantial or presumptive evidence" from which the fact of marriage might be inferred, and so was competent under the statute. Pub. Sts. c. 145, § 31.

8. The different requests for rulings founded upon the contention that the defendant was not guilty of polygamy, if at the time he contracted his second marriage he had a *bona fide* and reasonable belief that his first wife was dead, were properly denied. We consider that question to have been settled in this jurisdiction by the decision in *Commonwealth* v. *Mash*, 7 Met. 472, rendered in the year 1844, in which, speaking of a statute substantially like that under which the present defendant was indicted, this court said that "it was not the intention of the law to make the legality of a second marriage, whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death." See Rev. Sts. c. 130, §§ 2, 3; Gen. Sts. c. 165, §§ 4, 5; Pub. Sts. c. 207, §§ 4, 5. This statement has been since acted upon as a part of our system of law regulating marriages and controlling persons contemplating marriage. See *Commonwealth* v. *Munson*, 127 Mass. 459, 470.

If it ought to be changed the change should come from the Legislature. We therefore decline to treat the defendant's contention as an open question in this Commonwealth. If the reasons which, after much difference of opinion, have led to the final declaration in England that an honest and reasonable belief in the death of the former wife or husband is a good defence to a prosecution for polygamy, should be dealt with here, it should

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be by that department of the government which has the law-making power. See *Regina* v. *Tolson*, 23 Q. B. D. 168; *S. C.* 16 Cox C. C. 629. *Exceptions overruled.*

COMMONWEALTH *vs.* DENNIS McCARTHY.

Norfolk. January 28, 1895. — May 22, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Right of Person indicted for Felony to be present when Verdict is rendered.

While it is a right of the defendant indicted for a felony to be present when the verdict is rendered as well as during the earlier parts of the trial, and while it is irregular to begin the trial without his presence, yet if he is on bail and is present at the commencement of the trial, and afterwards voluntarily departs without leave and is absent when the verdict is returned, he may be defaulted and a verdict which will be binding upon him may be taken in his absence.

KNOWLTON, J. The defendant was indicted and tried for larceny in a building. He was on bail, and it must be assumed that he was present during the trial all the time until after the jury had retired to consider the case, when he voluntarily went away and remained absent until after they had returned with their verdict. He was then defaulted, and a verdict of guilty was received and recorded. He afterward moved to set aside the verdict, on the ground that the court could not properly receive it in his absence. This motion presents the only question in the case.

It is a general rule, both in England and in this country, that a trial for a felony cannot be had without the personal presence of the accused. 1 Co. Inst. 227 b. 3 Co. Inst. 110. 1 Chit. Crim. Law, (2d ed.) 635, 636. *Rex* v. *Ladsingham*, T. Raym. 193; *S. C.* 2 Keb. 687, and Ventris, 97. 2 Hale P. C. 298–300. 4 Bl. Com. 375. *State* v. *Hurlbut*, 1 Root, 90. *People* v. *Perkins*, 1 Wend. 91. *Sargent* v. *State*, 11 Ohio, 472. *Jones* v. *State*, 26 Ohio St. 208. *Prine* v. *Commonwealth*, 18 Penn. St. 103. *State* v. *France*, 1 Overton, (Tenn.) 434, 436. *Harriman* v. *State*, 2 Greene, (Iowa) 270. *Cole* v. *State*, 5 English, (Ark.) 318. *State* v. *Hughes*, 2 Ala. 102. *State* v. *Battle*, 7 Ala. 259. *Kelly* v. *State*,

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3 Sm. & Marsh. 518. *State* v. *Cross*, 27 Mo. 332. *People* v. *Kohler*, 5 Cal. 72. The trial is not concluded until the verdict is received and recorded. *Maurer* v. *People*, 48 N. Y. 1, and cases above cited. In this Commonwealth we have a statute which embodies the same general rule. Pub. Sts. c. 214, § 10. See *Commonwealth* v. *Costello*, 121 Mass. 371. Under this statute, as well as at the common law, it may well be held that when a defendant is in custody under an indictment for a felony the verdict cannot properly be taken in his case without his personal presence, even if he has been in attendance in all previous stages of the trial, and that whether he is in custody or on bail the trial cannot properly be begun in his absence. But whether a defendant who is on bail, and who has been present during his trial until the case has been given to the jury, can nullify the whole proceedings by absenting himself until it becomes necessary to discharge the jury, is a very different question. We have seen no well considered case that decides this question in the affirmative. In most of the reported cases the defendant was in custody, and the failure of the authorities to have him present when the verdict was taken deprived him of a right. In others, when the defendant was on bail there was an attempt to convict him without his being present at all; and in two or three others the general rule was applied without discussion to the case of a defendant on bail who had been present during a part of the trial and was absent when the verdict was rendered. But it has been repeatedly held, upon careful consideration, that while it is a right of the defendant indicted for a felony to be present when the verdict is rendered as well as during the earlier parts of the trial, and while it is irregular and improper to begin the trial in such a case without the presence of the accused, yet if he is on bail and is present at the commencement of the trial, and afterwards voluntarily departs without leave and is absent when the verdict is returned, he may be defaulted and a verdict which will be binding upon him may be taken in his absence. *Fight* v. *State*, 7 Ohio, 180. *Wilson* v. *State*, 2 Ohio St. 319. *Price* v. *State*, 36 Miss. 531. *Hill* v. *State*, 17 Wis. 675. *State* v. *Wamire*, 16 Ind. 357. See also *Lynch* v. *Commonwealth*, 88 Penn. St. 189. Such a case is treated as an exception to the general rule, and as a waiver by the defendant of his right to be present.

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The principal object of the general rule above referred to is that the defendant may have an opportunity to exercise his right of challenge, and may avail himself of other rights which cannot be so well exercised, if exercised at all, by his counsel in his absence. Another object is that he may be present at the end of the trial to receive the sentence of the court if found guilty; but under a system like ours, where the prisoner is allowed to give bail and to go at large during the hours that the court is not in session until the end of the trial, and afterwards if there are exceptions, or if there is a motion for a new trial, until these matters are disposed of, it would be unreasonable to hold that he can attend until the case is given to the jury, and, when he sees indications that the verdict is to be against him, can make it impossible to complete the trial, and thus nullify all that has been done by absconding. If he could do this, it would be necessary upon his return to try him again *de novo*, when perhaps it would be impossible to procure the evidence which was introduced at the first trial, and when, if he were again admitted to bail, he might a second time defeat the ends of justice by again departing. His departure under such circumstances ought to be deemed a waiver of his right to be present at the taking of the verdict. If the Commonwealth has done all that it can reasonably be required to do to secure him his rights, our statute, and the common law of which it is declaratory, ought not to be so construed as to prevent the return of the verdict. This final act of the jury is nothing more than a formal announcement of the result of a trial which, up to that point, has proceeded with unquestionable regularity. There is no very important reason for requiring the defendant's presence then. It is well that he should be there, ready to receive the sentence of the court; but the possibility of his absence is a risk to the Commonwealth which necessarily results from his admission to bail. He has a right to be personally present to take advantage of irregularities if there should be any; but when he voluntarily absents himself he cannot complain if the Commonwealth chooses to take the verdict when he cannot be immediately subjected to a sentence. The suggestion that the jurors should be required to look upon him when about to return their verdict, with the possibility that they may see something in his appearance at that time which

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will affect them in the performance of their duty, is not founded upon any important principle of law or good reason in the practical administration of justice. No detriment can ever come to a defendant from this construction of our statute, and a different construction of it would make it in some cases an instrument of great injustice.

Without determining what power the court has, if any, after the commencement of the trial of a criminal case to secure the attendance of the defendant when the jury are ready to return their verdict, we are of opinion that the ruling at the trial was correct. *Exceptions overruled.*

T. E. Grover & P. Daly, for the defendant.

R. O. Harris, District Attorney, for the Commonwealth.

FRANCES C. MARTIN, administratrix, *vs.* EVERETT M. BOWKER.

Suffolk. March 8, 1895. — May 22, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Use of Name in Business — "Successor" — Statute.

The provisions of Pub. Sts. c. 76, § 6, forbidding any person to "assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person" without written consent do not apply to advertising one's self as "formerly with" or "successor to" another.

If a business originally carried on by A., and afterwards by A. and his son B. under the name of "A. & Son," is purchased by B. and carried on by him under the same name until his death, and is given by him by will including the goodwill and other assets to his wife, and by her sold to C., with the right so far as she has the power to give it to use the name and description "C., successor to A. & Son," C. is a "successor," and a bill in equity by the administrator of A. will not lie to enjoin him from using the name and description.

HOLMES, J. This is a bill brought by the administratrix of the estate of Henry A. Martin, seeking to enjoin the defendant from using the name of Henry A. Martin in connection with the business of producing and selling animal vaccine virus. The only use of the name which the defendant has made or threat-

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ened to make is to describe himself as "Dr. Everett M. Bowker, successor to Dr. Henry A. Martin and Son."

The plaintiff relies chiefly on Pub. Sts. c. 76, § 6, forbidding any person to "assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person" without written consent. But we are of opinion that the statute does not apply to advertising one's self as "formerly with" or "successor to" another. The word "assume" in the statute means use for the first time, in the same way that is contemplated in the other branch, "continue to use in his business"; the latter plainly means to use as part or all of the partnership name, so as to indicate that the person named is a member of the firm.

Apart from the statute, the plaintiff shows no ground for an injunction. The defendant is a successor to Dr. Henry A. Martin and Son. The history of the business is this. Originally it was carried on by Dr. Henry A. Martin, and afterwards by him and his son, Stephen C. Martin, under the name of Dr. Henry A. Martin and Son. In 1876 the father retired, and the son became sole owner of the business by purchase, and carried it on under the same name until his own death in 1893. By his will he left it, including the good will as well as the apparatus and other assets, to his wife after a life estate which has dropped. The wife sold it to the defendant, and so far as she had power gave him the right to use the style and description complained of. Taking the strictest view of what is necessary to make a successor, there is no doubt that the defendant is one, and this being so he has a right to advertise the fact to the world. *Emerson* v. *Badger*, 101 Mass. 82, 86, 87. *Knoedler* v. *Boussod*, 47 Fed. Rep. 465, 466. *S. C. sub nom. Knoedler* v. *Glaenzer*, 55 Fed. Rep. 895, 897. *Churton* v. *Douglas*, H. R. V. Johns. 174, 190. See *Hookham* v. *Pottage*, L. R. 8 Ch. 91.

Bill dismissed.

L. D. Brandeis, (*F. H. Williams* with him,) for the defendant.

T. C. Batchelder, for the plaintiff.

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EDWARD R. EAGER & others, executors, *vs.* ARTHUR H. WHITNEY.

ANDREW S. BROWNELL, administrator, *vs.* EDWARD B. EATON & another, trustees.

Middlesex. March 18, 1895. — May 22, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Trust — Legal Representatives — Contingent Remainder.

Where a will provides that property in the hands of trustees is to be by them paid over at a future date, discharged of all trust, to those persons who at that time shall be the testator's legal representatives, that is, to those who will be entitled to succeed to personal estate in case of intestacy, a contingent and not a vested remainder is created.

THE FIRST CASE was a petition to the judge of probate of the county of Middlesex, by Edward R. Eager and others, executors of the will of Leonard Whitney, late of Watertown, deceased, to obtain the instructions of the court as to the construction of the will. The judge decreed as follows: "It appearing that the said Emily F. Brownell died after the testator, intestate, leaving a husband and no issue, it is determined that the said Emily F. Brownell took a vested interest in her distributive share of the estate of said testator, both real and personal, as it existed at the time of his death, subject however to the charges imposed upon it by said will; that the same was in pursuance of the provisions of said will all duly converted into personalty before the death of the said Emily F. Brownell, and that her personal representatives are now entitled to receive from the petitioners the same income she would have been entitled to receive had she been living"; and "that the said petitioners pay to the personal representatives of the said Emily F. Brownell one twelfth of the net income of the property of which the wife of the testator is to have two thirds of the income as set forth in said will, from the time of the death of said Emily F. to the date of this decree; and from and after the date hereof to pay her personal representatives said income

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semiannually until the final distribution of the estate of said deceased or until the further order of court."

Arthur H. Whitney, a son and one of the heirs of the testator, appealed to this court. Hearing before *Holmes*, J., who, at the request of the parties, reported the case for the determination of the full court. The material facts appear in the opinion.

THE SECOND CASE was a petition to the judge of probate of the county of Middlesex, by Andrew S. Brownell, the administrator and sole personal representative of Emily F. Brownell, one of the legatees under the will of the said Leonard Whitney, praying that the executors and trustees be ordered to pay over to the petitioner, discharged of all trust, certain portions of the principal of the estate. The judge decreed "that it was the intention of the said testator that the principal of the 'property' belonging to the estate of said testator in the hands of said trustees should not by them be paid to those entitled thereto until the year 1901."

The petitioner appealed to this court. Hearing before *Holmes*, J., who reported the case with the former appeal for the determination of the full court. The material facts appear in the opinion.

J. J. Myers, (*F. Lawton* of New York with him,) for Andrew S. Brownell.

R. Stone & J. J. Higgins, for Arthur H. Whitney.

ALLEN, J. The only question directly presented by these cases is, whether the surviving husband of the testator's daughter, Mrs. Brownell, who died in 1885, is entitled to any part of the income or principal of the testator's property. If Mrs. Brownell had only a contingent remainder in a portion of the trust estate which is to be distributed in 1901, then her surviving husband is entitled to nothing; and this is the conclusion to which we have come.

The will was dated January 29, 1879. The testator had a wife, Caroline I. Whitney, and four children, namely, one daughter, Emily F. Brownell, then married to Andrew S. Brownell, and three sons, Arthur H. Whitney, Fred A. Whitney, and Charles E. Whitney. The son who is first named was not yet of age, but became so shortly afterwards. The general scheme of the will is as follows. The testator had an

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interest valued at about $280,000 in a firm, and about $200,000 in other property, mostly personal. The will gives the household goods to his wife, and all the rest of the property in trust; and directs all the trust property except what is in the firm to be converted into interest bearing securities, the whole income of which shall be paid to his wife; and the income of the property in the firm is to be paid, two thirds to his wife, three twelfths in equal proportions to his daughter and two of his sons, and one twelfth to be held for the benefit of his other son with certain special provisions. If his daughter or either of the two sons first named should die leaving issue, such issue is to take the share of the income which the parent would have taken. There is no similar provision in case of the death of the other son. The trust is to terminate and the property in the hands of the trustees to be by them paid over to the testator's legal representatives in 1901. Until and during the year 1901, the testator's wife is authorized to dispose by will, and not otherwise, of one third part of the personal property. No power of disposition by will or otherwise is given to any one of the children.

This will means, we think, that the property in the hands of the trustees shall be by them paid over in 1901 to those persons who at that time shall be the testator's legal representatives; and by legal representatives it means those who would be entitled to succeed to personal estate in case of intestacy. *Bates, petitioner*, 159 Mass. 252, 258. The principal reasons leading to this conclusion are as follows.

If the remainder vested at the testator's death, the share of the widow and of each child would be descendible, devisable, and assignable; and in this way the husband of his daughter or the wives of his sons might come in for a share by inheritance or gift. The testator knew that his daughter was married, and had in mind that his sons might be, and made provision for the event of the death of his daughter, or of either of his two sons first named, leaving issue. The omission of any provision in such case for the surviving husband or wife goes to show that he meant to exclude them.

The authority given to his wife to dispose by will of one third part of the property before or during the year 1901 implies that without this provision she would not have this authority. The

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omission to give a similar authority to either of the children implies that no such authority was intended to be given to them. Especially is this so in respect to Charles, concerning whom, for some reason not disclosed, particular provisions are made. If the remainders were vested, the testator's wife and all of his children might at any time dispose of their interests, to take effect at the latest in 1901.

There is no gift to the legal representatives, independently of the direction to the trustees to pay over to them in the year 1901. The time is thus annexed to the gift. It is a legacy given as of that year. An arbitrary date is fixed, at which the trust is to end and the property to be paid over. The form of expression used may not be necessarily conclusive, but it has a tendency to show that the gift was to those who should then be his legal representatives. Decisions supporting this view are cited in 2 Wms. Ex. (9th ed.) 1108.

An argument is made that, if the above construction is adopted, circumstances may arise under which the children or their issue may be inadequately provided for, — a result which the testator would not probably have wished. But it is to be observed that as to Charles there were reasons not known to us leading the testator to put him on a special footing; that if either of the other children of the testator should die, leaving issue, such issue would take the income which otherwise would go to the parent; that the testator's wife, the mother of the children, would have a large income during her life, with power to dispose by will of one third of the trust property, and that she could thus meet any exigencies; and that the trust is to end in 1901, so that the final distribution is not postponed to a very remote date.

We do not deem it desirable to make a detailed review of the authorities, which have been cited in very recent decisions. *Peck* v. *Carlton*, 154 Mass. 231. *Proctor* v. *Clark*, 154 Mass. 45. *Wood* v. *Bullard*, 151 Mass. 824. *Fargo* v. *Miller*, 150 Mass. 225.

The result is, that the decree of the Probate Court in the first case, ordering the payment of income to the personal representatives of Mrs. Brownell, must be reversed; and that the decree in the second case, refusing to order the payment of principal to the petitioner, must be affirmed. *Ordered accordingly.*

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LUKE H. TAFT & another, executors, *vs.* EMELINE N. TAFT & others.

EMELINE N. TAFT *vs.* LUKE H. TAFT & others.

Worcester. April 2, 1895. — May 22, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Will — Ante-nuptial Agreement — Real Action — Jointure — Dower — "Distributive share" of Personal Estate.

If the provisions in a will in favor of the testator's wife are not intended to be a substitute for her rights under an ante-nuptial agreement, she is not, by accepting the provisions of the will, precluded from claiming also under the agreement.

THE FIRST CASE was a bill in equity by the executors of the will of Moses Taft to obtain the instructions of the court as to the construction of the will and of the ante-nuptial agreement between the testator and Emeline N. Taft. Hearing before *Lathrop*, J., who reserved the case upon the bill and answers for the determination of the full court. The material facts appear in the opinion.

THE SECOND CASE was a writ of entry to recover one undivided sixth part of one undivided half of a lot of land with a building thereon in Uxbridge. Plea, *nul disseisin*. The case was submitted to the Superior Court, and, after judgment for the demandant, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

H. M. Knowlton, for the residuary legatees under the will of Moses Taft.

W. S. B. Hopkins & F. B. Smith, for Emeline N. Taft.

ALLEN, J. The principal question presented by these cases is, whether the provisions in the testator's will in favor of his wife were intended to be a substitute for her rights under the ante-nuptial agreement, so that by accepting the provisions of the will she is precluded from claiming also under the agreement.

By the ante-nuptial agreement, which was dated December 12, 1857, she was to continue to have and to hold all of her own estate, real and personal, after the marriage, and also such other

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estate as she might subsequently acquire in her own right; and in case he should survive her, all of the above was to descend to her child or children. In case she should survive him, she was to be endowed in one half part only of his real estate; that is, her dower was to be one sixth part only instead of one third part of his real estate; and she was to receive one sixth part only instead of one third part as her distributive share in his personal estate. She was also to release her rights of dower and homestead in case he should wish to convey real estate during coverture; and in case his heirs or other persons interested in his real estate after his death should wish to do so, she was to release her rights of dower and homestead on receiving a just equivalent therefor. This ante-nuptial agreement was not to apply to any house in which they might live at the time of his decease.

There is nothing to show what amount of property she owned then, or at any time thereafter. He died April 2, 1893. His property had largely increased during their life as husband and wife, and after his death it was appraised as follows: personal property, $309,250; homestead, $9,000; other real estate, $6,800; being in all, $325,050. His debts were from $3,000 to $5,000.

The residuary legatees, who are children and grandchildren of the testator, contend that she has no such present interest in the real estate other than the homestead as to enable her to maintain a real action, because the contract does not amount to a jointure. The contract, however, does not purport to bar her right of dower wholly, but cuts it down one half. She surrendered one half of her right of dower in all real estate he might die seised of except the homestead. The agreement does not create an estate in her. The law creates the estate, which by the agreement she gave up, to the extent of one half.

They further contend that under the agreement she takes no interest in the personal estate, because the words used are that she shall receive one sixth part only, instead of one third part, as her "distributive share" of his personal estate; that the words "distributive share" in their legal meaning relate only to an intestate estate, or to an estate made intestate as to a widow by her waiving the will; that this is not an intestate estate in either sense; and therefore that the contract gives her

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no right to any portion of his personal estate. Such we understand to be the contention in behalf of the residuary legatees. But this is too strict and technical a construction of the words used. The meaning is, that she shall receive one sixth part of his personal estate.

In view of the contract, then, taken by itself alone, she would now be entitled to dower in the homestead, to a life interest in one sixth part of the rest of his real estate, and to one sixth part of his personal estate. Her share of the personal estate would amount to $51,541.67.

If there were no ante-nuptial agreement and no will, she by law would be entitled to dower in all of the real estate, and to one third part of the personal estate, which one third would amount to $103,083.33.

Mr. Taft's will is dated February 23, 1886. The value of his property at that date is not given. The will makes no mention of the ante-nuptial agreement, but gives to "my beloved wife" the use of the homestead for life; the furniture, etc., of the value of $1,000; the sum of $5,000; and an annuity of $1,200 during her life. To raise this annuity would require the holding of $30,000, reckoning the income at four per cent, which counsel on both sides assume to be a reasonable rate.

It is apparent that if the provisions for her in the will are held to supersede the ante-nuptial agreement she will get materially less than by the agreement, estimating the property at its appraised value after the testator's death.

There is no intimation in the will that its provisions were intended to supersede the agreement. He could not cut down her rights under the agreement without her consent. We find nothing in the circumstances to show an intention of asking her consent to any reduction or change of her rights under the agreement. It seems probable, rather, that with the increase of his property he wished to do more for her comfort and enjoyment during life. To this end, he gave her outright $5,000 in money, and furniture of the value of $1,000; the use for life of the homestead, instead of her dower therein; and what practically amounts to the income of $30,000 during her life. His own descendants will ultimately get the whole of this property except the $5,000 in money and the furniture. And even with

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the addition of these provisions in her favor to her rights under the agreement, she will get less from his estate than she would have got if there had been no agreement and no will.

The result is, that she has the right to take what is given to her by her husband's will, in addition to what she is entitled to receive under the ante-nuptial agreement. She is entitled to judgment in the real action; and in the petition of the executors, instructions will be given in accordance with this opinion.

Ordered accordingly.

TIMOTHY J. SULLIVAN *vs.* THOMAS J. BORDEN & others.

Bristol. October 23, 1894. — May 23, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Revocation of Liquor Licenses by Board of Police — Statute — Certiorari.

The board of police of Fall River have the power, under St. 1894, c. 351, § 2, to order licenses of the first and fourth classes for the sale of intoxicating liquors to be forfeited and revoked for a breach of the conditions thereof.

Whether certiorari will lie in case it appears that a board of police exceeded their jurisdiction under a statute in forfeiting and revoking a license for the sale of intoxicating liquors, *quære*.

PETITION, by Timothy J. Sullivan, for a writ of certiorari to quash the proceedings of the board of police for the city of Fall River in forfeiting and revoking his licenses of the first and fourth classes for the sale of intoxicating liquors.

Hearing before *Holmes*, J., upon the petition, answer, and the agreement of the parties that the respondents did not adjudge the petitioner's licenses forfeited because of any unsatisfied judgment recovered under Pub. Sts. c. 100, § 21, and that the petitioner did not admit that he had violated any of the conditions of his licenses. The judge ordered the petition to be dismissed, and, at the petitioner's request, reserved the case for the consideration of the full court. The material facts appear in the opinion.

J. W. Cummings, (*C. R. Cummings* with him,) for the petitioner.

A. J. Jennings, for the respondents.

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MORTON, J. The petitioner does not contend that, if the board had power to revoke his license, there was any irregularity in their proceedings. He insists that, under the statute creating it, the board had not the power of revocation, but that that remains with the mayor and aldermen. So much of the statute establishing the board as is now material is as follows: "Said board shall also act as license commissioners for said city, and shall have and exercise all the powers and perform all the duties conferred and imposed by the statutes of the Commonwealth upon the mayor and aldermen and city clerk of said city relative to the granting and signing of licenses for the sale of intoxicating liquors, and relative to the granting and signing of licenses to persons to be innholders or common victuallers, in said city." St. 1894, c. 351, § 2. It is apparent that the board is to act upon liquor licenses, and licenses to innholders and common victuallers, and not in regard to licenses generally; and the powers that are conferred upon it, whatever they may be, are those of the mayor, and of the aldermen, and of the city clerk, and not those of the mayor and aldermen as one body, and of the city clerk. We think that this is the more natural construction, and that if the Legislature had meant the joint body of the mayor and aldermen, it would have used, as it easily could have done, language more clearly expressing its purpose. It may be observed that the punctuation of so much of the printed statute as we have quoted agrees with that of the act as finally engrossed.

The question then is, whether the board is restricted to the granting and signing of licenses, or whether it has generally, in regard to the licenses which it is authorized to grant, the powers which had previously been vested in the mayor and aldermen, and the city clerk. We think that the latter is the true construction. No satisfactory reason can be given why the power to issue licenses should have been given to the board, and the power to revoke them left with the mayor and aldermen. The licenses are not contracts, but are in the nature of permissions to carry on a business which the Legislature has deemed it wise to surround with restrictions. *Calder* v. *Kurby*, 5 Gray, 597. Naturally, it would seem that the responsibility for the continuance of his license to an individual who has violated any of those restrictions, or who for any reason should not

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be suffered to continue in the business, should rest upon the board or tribunal which was responsible for the issue of the license to him. And such has been the tendency of legislation in this State; Prov. St. 1711–12, c. 6, § 4; 1 Prov. Laws, (State ed.) 680; 3 Mass. Col. Rec. 359; St. 1786, c. 68, §§ 2, 3, 8; Rev. Sts. c. 47, §§ 5, 8; St. 1837, c. 242, § 3; St. 1852, c. 322, §§ 4, 11; St. 1868, c. 141, §§ 2, 9, 14, 23; St. 1875, c. 99, §§ 4, 12; St. 1887, c. 206; St. 1894, c. 428, § 4; Pub. Sts. c. 100, §§ 16, 23; Pub. Sts. c. 102, §§ 11, 27, 28, 32, 115; though in some cases, the reasons for which are evident, the power of revocation has been given to courts. St. 1832, c. 166, § 10. Rev. Sts. c. 47, § 8. Pub. Sts. c. 100, §§ 6, 7. Pub. Sts. c. 102, § 19. Without some plain reason, therefore, we should hesitate to conclude that the Legislature intended by this statute to depart from the policy which it had hitherto pursued. The fact that it has not in terms provided that the board should not have the power of revocation, we should not regard as of itself such a reason. The intention of the Legislature is the main object of inquiry, and that is to be ascertained not only from the language of the particular provision, but also from the general scope of the statute and from other provisions relating to the sale and license of intoxicating liquors, and the licensing of innholders and common victuallers. By Pub. Sts. c. 100, § 19, it is provided that, when a person holding a license is convicted of the violation of any law relating to the business which he is licensed to pursue, the court in which or the magistrate before whom the conviction is had shall send to the board which issued the license a certificate showing the time and place of such conviction; the purpose evidently being to furnish the licensing board with information on which it can act in revoking the license. The construction for which the petitioner contends would impair the force of this section if it did not render it nugatory, which could hardly have been intended by the Legislature. Again, by § 23 of the same chapter, it is provided that, if a judgment recovered under § 21 remains unsatisfied for thirty days, the board granting the license shall revoke it. The force of this section also, under the petitioner's construction, would be impaired. Further, by § 28 of the same chapter it is provided that the powers and duties given to

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and imposed upon the mayor and aldermen of cities by that chapter, and which includes the power of revocation (§ 16), shall be exercised in the city of Boston by the board of police commissioners. Though possible, it is not at all probable that the Legislature could have intended to confine the powers of the police commissioners in another city when dealing with the license and sale of intoxicating liquors within narrower limits. Lastly, the construction which we have adopted derives support from the fact that the general act of 1894, c. 428, which established boards of license commissioners, and which was passed at the same session and only a short time after the act under consideration, by § 4, provided that such commissioners should "exercise the powers and perform the duties given to and imposed upon the mayor and aldermen of cities" by chapters 100 and 102 of the Public Statutes.

In view of these considerations, we think that the Legislature used the words "the granting and signing of licenses" not in a restricted sense, but as words of general description, and as including the whole matter of licenses, and that the respondents had therefore the power to revoke the license in question.

We have assumed, without deciding or considering it, that certiorari would lie in case it appeared that the respondents had exceeded their jurisdiction.

Since the hearing in this case the Legislature, by St. 1895, c. 343, has removed any ambiguity which previously existed under St. 1894, c. 351. But so far as the present question is concerned, we regard the statute of 1895 as declaratory of what was intended by the former statute, and as not affecting the construction which we have adopted.

Petition dismissed.

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J. FRANK STONE & another *vs.* WILLIAM A. N. STONE.

Worcester. March 7, 1895. — May 23, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Equity Procedure — Redemption of Land sold for Taxes — Costs.

In the absence of statute or of a rule of court, it is within the discretion of the presiding judge to refuse to dismiss a bill in equity on which a preliminary injunction has been issued and served merely because no subpœna was taken out or served until more than three months after the filing of the bill.

When land is sold for taxes assessed to one not the owner, without the knowledge of the latter and without notice to him of the assessment or demand upon him for payment, his subsequent grantee and he, as mortgagee back of such grantee, may, under St. 1888, c. 390, § 57, upon tender of the sum required by law within two years after actual notice of the sale, jointly maintain a bill to redeem the land from such sale, and from a judgment for possession rendered against the grantee on a writ of entry brought by the purchaser at the sale.

Where an order of the Superior Court overruling a motion to dismiss a bill in equity for alleged want of prosecution, and a final decree declaring the plaintiff entitled to redeem land sold for taxes, are affirmed by this court on appeal, it is equitable that the defendant should pay the costs.

BILL IN EQUITY, filed April 1, 1893, by J. Frank Stone, as mortgagee, and James Slattery, as owner, to redeem a tract of land in Holliston from a sale to the defendant for non-payment of taxes, and from a judgment for possession of the same land rendered in favor of the defendant in a writ of entry brought by him against the plaintiff Slattery. Hearing in the Superior Court, before *Hammond*, J., who overruled the defendant's motion to dismiss the bill, and entered a decree for the plaintiffs; and the defendant appealed to this court.

L. H. Wakefield, for the defendant.

F. A. Gaskill, for the plaintiffs.

BARKER, J. This case, having been heard upon the merits by a justice of the Superior Court, who has entered a final decree for the plaintiffs, comes before us upon two appeals taken by the defendant.

1. The first appeal was from an interlocutory order of the Superior Court overruling the defendant's motion to dismiss the bill for the reason that the bill was filed on April 1, 1893, and no subpœna was taken out or served until more than three months after the filing of the bill. The defendant con-

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tends that no subpœna could be taken out returnable later than June 1, 1893, the bill having been filed and a preliminary injunction issued and served on the defendant on April 1, 1893. He cites St. 1885, c. 384, § 1, which has no application to this question. While it is a usual practice to take out a subpœna upon the filing of the bill, there is no statute or rule of court prescribing the time within which a subpœna must be taken out. If the defendant does not voluntarily appear, the taking out of the subpœna may be the next step in order in the prosecution of the plaintiffs' bill, and a failure to take it seasonably may be a ground for moving to dismiss the bill for want of prosecution. But in the present case, although by service of the injunction upon the filing of the bill the defendant had prompt notice of the pendency of the action, and no subpœna was issued until September 5, 1893, nothing was done by the defendant to bring the failure to prosecute the action to the attention of the court until October 31, 1893, when he filed an answer stating the facts concerning the time of the filing of the bill and of the issuing of the subpœna, and contending that the plaintiffs had failed properly to summon him into court. His motion to dismiss the bill was not filed until February 27, 1894, when it was heard and overruled.

In our courts the power to dismiss an action in equity for want of prosecution is not regulated by statute. The 16th Equity Rule, which by force of statute is a rule of the Superior Court, provides that if the plaintiff, after the coming in of the answer, does not seasonably file a replication or exceptions to the answer, or set the cause down for hearing on the bill and answer, a decree may be entered for the dismissal of the bill with costs. Aside from the operation of this rule, questions whether a bill shall be dismissed for want of prosecution are to be determined by the general practice of courts of equity, and in the absence of specific directions embodied in statutes or general rules of court, the decision of such questions is usually within the sound discretion of the court by which they are to be determined. In the present case the only facts appearing are those stated, and the denial of the motion was right.

2. The other appeal is from the final decree in favor of the plaintiffs, by which they were declared entitled to redeem the

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premises described in their bill from the tax sale to the defendant, and the judgment for possession rendered in his favor in the writ of entry brought by him against the plaintiff Slattery. As this decree was entered after a hearing upon the merits, and as no report is made of the evidence or of the facts found, the decree must stand, if justified by the bill. We must assume that on May 1, 1889, when the tax was assessed, the plaintiff, J. Frank Stone, was the owner of the lands, and that the person to whom they were assessed was not the owner, and that no notice of the assessment and no demand for the payment of the same was made upon the owner, and that the plaintiffs had no knowledge of the assessment or the sale for taxes until shortly before the filing of their bill; also that each plaintiff tendered to the defendant the sum required by law to redeem the lands from the sale. The sale was on March 29, 1890, and the tender about February 6, 1893, and the decree involves the finding that the tender was within two years after either of the plaintiffs had actual notice of the sale. As the person named in the tax list as the owner of the lands was not their rightful owner, any person having such title thereto that he might have recovered the same if no such sale had been made had a right under the statute to redeem the same at any time within two years after he had actual notice of the sale. St. 1888, c. 390, § 57. Each of the plaintiffs was therefore in a position to redeem the lands when the tenders were made, and when the bill was brought. The question of the right to redeem does not appear to have been raised or determined in the writ of entry against Slattery. When judgment for possession was entered in it in favor of the present defendant, he was entitled under the tax sale to the possession which the judgment gave him, but after due tender for the purpose of redemption he was no longer entitled to such possession, and his judgment upon the writ of entry is no bar to this suit for redemption.

No contention was made in the Superior Court, or in the argument in this court, that the plaintiffs could not properly join in the bill. When the tax was assessed and the sale for non-payment of the tax was made, the plaintiff J. Frank Stone was the owner of the land, and on November 11, 1891, he conveyed it to the plaintiff Slattery, and at the same time took

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a mortgage back to secure a part of the purchase money; and with the exception of the judgment in the writ of entry against Slattery, this was the state of the title when the tenders were made to redeem the land from the tax sale, and when this bill was filed.

Assuming that a mortgagee whose mortgage is in existence when a tax sale is made, and whose mortgage is extinguished thereafter, has no standing to redeem from the sale after the extinguishment of his mortgage, as may be inferred from the case of *Keith* v. *Wheeler*, 159 Mass. 161, that doctrine does not prevent either of the present plaintiffs from redeeming under the statute. Such a mortgagee, after the extinction of his mortgage, is no longer a person having such title that he might have recovered the land if no such sale had taken place. But each of the present plaintiffs is such a person, the plaintiff Stone by virtue of his mortgage of November 11, 1891, from Slattery, and Slattery by virtue of his deed of the same date.

We think it equitable that the costs of these appeals should be paid by the defendant.

The case is remitted to the Superior Court, the decree overruling the motion to dismiss being affirmed, and the final decree in favor of the plaintiffs affirmed, with costs of the appeal.

So ordered.

BENJAMIN S. MARSTERS *vs.* JOHN CLING.

SAME *vs.* CHARLES WASSMUTH.

SAME *vs.* EDWARD A. PIKE.

Suffolk. March 12, 1895. — May 23, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, & BARKER, JJ.

Right to maintain Summary Process for Recovery of Land.

The lessee under a written lease of the purchaser at an execution sale of lands may, after written notice to the tenant at will of the original owner to quit and deliver up the premises, maintain an action on the Pub. Sts. c. 175, against him to recover possession thereof without showing forcible entry or forcible detainer; and it is immaterial that the defendant never held under nor attorned to the plaintiff.

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ACTION, on Pub. Sts. c. 175, to recover possession of certain premises in Boston. Trial in the Superior Court before *Sheldon*, J., who ordered a verdict for the plaintiff in each case; and the defendants alleged exceptions. The facts appear in the opinion.

H. J. Edwards, for the defendants.

W. F. Slocum, (*C. H. Fleming* with him,) for the plaintiff.

BARKER, J. In these cases each defendant was a tenant at will of one Kendall of lands of which he was seised as tenant in curtesy. Kendall's estate was attached upon a writ against him, and was duly levied upon and sold and conveyed upon execution to the plaintiff's lessor. Thereafter a written lease of the premises was made by the purchaser at the execution sale to the plaintiff, who thereupon gave to each of the defendants written notice to quit and deliver up the premises to him, as he had taken a written lease of the same for one year. The defendants remained in possession, claiming as tenants at will of Kendall, and the plaintiff brought these actions under Pub. Sts. c. 175.

At the trial, the defendants contended and asked the court to rule that the actions could not be maintained, first, because neither the plaintiff nor his lessor had ever had possession of the premises, and, secondly, because the relation of landlord and tenant did not exist and had never existed between the plaintiff and the defendants.

But the plaintiff holds under Kendall, who was the defendants' lessor, having acquired Kendall's title under the execution sale and the lease from the purchaser at that sale. Originally tenants at will, the defendants were made tenants at sufferance by the sale, and the plaintiff after giving his notices had the right to immediate possession. Each case is that of a tenant who holds possession without right after the determination of a lease, and is an instance of the third class of cases for which the summary process for the recovery of lands is given by Pub. Sts. c. 175, § 1. In such cases the plaintiff need show no forcible entry nor forcible detainer, and he may maintain the action against one who has been the tenant of a former owner to whose title the plaintiff has succeeded, although the defendant has never held under nor attorned to the plaintiff. *Howard* v. *Merriam*, 5 Cush. 563, 567, 583. *Rooney* v. *Gillespie*, 6 Allen, 74.

Exceptions overruled.

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NATHANIEL G. MANSON *vs.* CITY OF BOSTON.

Suffolk. March 13, 1895. — May 23, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Eminent Domain — Assessment of Damages — Evidence of Acts subsequent to the Taking.

At the trial of a petition for the assessment of damages caused to the owner of land taken in fee by a city for a public purpose, evidence is competent of a change of grade in the land taken, though established and made after the taking, which renders the construction of a retaining wall necessary to the safety of the petitioner's remaining land; and the petitioner may recover the cost of such retaining wall as a part of his damages.

PETITION to the Superior Court for the assessment of damages caused by the taking of land by the park commissioners of the city of Boston. Trial in the Superior Court, before *Dunbar*, J., who, after a verdict for the petitioner, reported the case for the determination of this court. The material facts appear in the opinion.

T. M. Babson, for the respondent.

R. M. Morse, (*J. Duff* with him,) for the petitioner.

ALLEN, J. The recent decision in *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, *ante*, 386, goes far towards settling both of the questions presented in this case. In that case a part of the petitioner's land was taken for a public sewer; and it was held that the owner might put in evidence the reasonable cost of any necessary adaptation of his land to the new state of things produced by the public work for which the land was taken, if the adaptation and the cost were proper, having reference to the market value of the remaining part of the land; and that evidence of the subsequent acts showing the mode of constructing the sewer might be received, when offered by the defendant for the purpose of reducing the damages, as competent to aid the jury in determining what the damages were.

The damages, to be sure, are to be assessed as of the time of the taking; but when the taking is for a public purpose which may involve a change in the surface, since the damages are to

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be fixed once for all, if they are estimated before the work is actually done, it is to some extent an estimate of prospective damages; *Edmands* v. *Boston*, 108 Mass. 535, 547; but if they are estimated after the work has been done, it is more direct and simple to show just how the land is left, and we are of the opinion that this may be done, as an aid to the jury, even though the manner of construction, and the excavations or fillings which are to be made, are not fixed in advance. This indeed is often for the benefit of the defendant, as otherwise the jury, in estimating according to the full measure of the right acquired by the public, might allow more than they would upon seeing the work actually done.

The defendant, however, contends that no change of grade was established at the time of taking the petitioner's land, and that, as the taking was of the fee, the city might afterwards do upon its own land exactly what any other owner could do on his own land; and that therefore no evidence of subsequent acts could be received. But when the city for public purposes takes a part of a man's land compulsorily, and is to pay the damages caused by such taking, the owner is entitled to compensation for the damage caused by such taking. If the city is to be an owner in fee, with the rights of such owner, the question is how much must it pay therefor; and if one of its rights is to dig down the land, and thus injure the other land of the former owner, that is an element to be considered in estimating the damages.

But it is urged that the petitioner disclaimed seeking compensation for injury to his remaining land, and therefore the above considerations do not apply. There is a little uncertainty at first sight in the statement of the ground taken by the petitioner at the trial. The report states that he contended that the house nearest to the line of the cutting was diminished in value by the taking; that he said he did not seek to recover any damages for injury to the remaining land; but that he asked that the cost of a suitable retaining wall be included in his damages. Taking all of these various statements, especially in view of the course of the trial, it seems that he contended that one of his houses would be diminished in value unless there should be a retaining wall, because the driveway would not be safe; but that, apart from

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this, he made no claim for damages to his remaining estate. Under these circumstances, the waiver was not an absolute one, and the questions in respect to the retaining wall properly arose. The jury having found the erection of such a wall to be the best way of diminishing the damages, the cost of it might be included in the verdict. *White* v. *Foxborough*, 151 Mass. 28.

We therefore are of opinion that evidence might be received of the change of grade made by the park commissioners after the taking, and that the petitioner under the circumstances might recover the cost of a retaining wall as part of his damages.

Judgment on the verdict.

GEORGE W. DAVIS *vs.* EDWARD P. MILLS & another.

Middlesex. April 2, 1895. — May 23, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Interrogatory — Waiver — Expert — Exclusion of Evidence — Exception.

An interrogatory intended not to elicit evidence in support of any matter of defence alleged by the defendant, but only to ascertain the evidence relied on by the plaintiff to maintain his case, is not within Pub. Sts. c. 167, §§ 49–56, and there is no ground for the contention that the plaintiff waived his right to refuse to answer the interrogatory by answering other interrogatories which he could not have been compelled to answer.

In an action for an alleged breach of a warranty in the sale of flour, a witness, who has been a miller for more than twenty years and has been accustomed to use a process for analyzing flour that is also used by others more or less, may well be found to be an expert in regard to the quality and principal component parts of flour, and the fact that he is not a practical chemist does not necessarily make his testimony valueless.

In an action for an alleged breach of a warranty in the sale of flour, the fact that considerable time has elapsed between the sale of the flour and an examination of it by an expert witness does not render his evidence incompetent, if there is testimony that there would be but little change in the flour if it was properly kept.

If soon after the beginning of the testimony of an expert witness in an action for an alleged breach of a warranty in the sale of flour, the judge of his own motion excludes certain specimens of other flour from the consideration of the jury, and all testimony in regard to them is stricken out, and the defendant makes no objection and takes no exception to the exhibition of the specimens, but his objections and exceptions are on general grounds to receiving the testimony of the expert at all, and nothing is said by the witness in regard to the specimens

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excluded, and the only complaint of the defendant is that they were in the hands of the witness and were shown to the jury with a specimen of the flour sold by him, he has no ground of exception.

CONTRACT for an alleged breach of a warranty in the sale of two hundred barrels of flour by the defendants to the plaintiff. The answer was a general denial. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

S. W. Clifford, for the defendants.

J. T. Joslin & R. E. Joslin, for the plaintiff.

KNOWLTON, J. The defendants' first exception is to the refusal of the court to order the plaintiff to answer the sixth of the interrogatories filed under the statute, which called upon the plaintiff to repeat as fully as he could the conversation between him and the defendants' agent when the oral contract on which the action was founded was made. The answer filed by the defendants was simply a general denial, and the interrogatory was not intended to elicit evidence in support of any matter of defence alleged by the defendants, but only to ascertain the evidence relied on by the plaintiff to maintain his case. Clearly the inquiry was not within the statute, which only permits interrogatories to be put for the purpose of obtaining facts that will be of service to the interrogating party in maintaining his own allegations. Pub. Sts. c. 167, §§ 49–56. *Wilson* v. *Webber*, 2 Gray, 558. *Baker* v. *Carpenter*, 127 Mass. 226. *Wetherbee* v. *Winchester*, 128 Mass. 293.

It is contended that the plaintiff waived his right to refuse to answer this interrogatory by answering other interrogatories which he could not have been compelled to answer. But we think there is no good ground for this contention. The defendants cannot justly complain that interrogatories were fully and fairly answered which the plaintiff might properly have declined to answer. Nor is there any good reason why the answering of these should deprive the plaintiff of his right to refuse to answer others if they were improper. *Fels* v. *Raymond*, 139 Mass. 98, 100.

There was evidence from which the presiding justice might well find the witness Porter to be an expert in regard to the

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quality and principal component parts of flour. He had been a miller for more than twenty years, and had been accustomed to use a process for analyzing flour that was also used by others more or less. The fact that he was not a practical chemist would not necessarily make his testimony valueless.

The time — nearly three years — which had elapsed between the sale of the flour to the plaintiff and the examination of it by the witness, did not render the evidence incompetent. There was testimony that there would be but little change in the flour if it was properly kept.

It is by no means clear that the specimens of other flour, in connection with other testimony of Porter in regard to it, might not properly have been used in evidence by way of illustration, but if we assume that they could not, the defendants have no ground of exception. Very soon after the beginning of the testimony, the judge, of his own motion, excluded the specimens of flour from the consideration of the jury, and all testimony in regard to them was stricken out. The defendants made no objection, and took no exception to the exhibition of these specimens, but their objections and exceptions were on general grounds to receiving the testimony of the expert at all. Nothing was said by the witness in regard to the specimens excluded, and the only complaint of the defendants is that they were in the hands of the witness, and were shown to the jury with a specimen of the flour sold by them. But as soon as the judge interfered the exhibits of the other flour were withdrawn, and they were not afterwards seen by the jury nor referred to by the parties. There is nothing to indicate that the defendants were in any way prejudiced by the course of the trial.

Exceptions overruled.

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FRANK H. WARREN vs. BOSTON AND MAINE RAILROAD & others.

Hampshire. November 15, 1894. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence — Due Care — Assumption of Risk — Contribution between joint Tortfeasors — "Tortious Act."

In an action of tort against several defendants, where no question of the liability of the defendants among themselves is raised by the pleadings, tried or argued, an order of the court directing a verdict in favor of one of them is not subject to exception by the others.

Where it appears that the plaintiff, a traveller in a buggy on the highway, upon entering the crossing of the way by a railroad at grade, found the gates up, that he looked both ways, and heard no bell or whistle, that the first notice he had of danger was when the gates began to be lowered after he was part way across the tracks, that he got across the tracks and cried out to the gate-keeper to raise the gates, which the latter did not do, and that thereupon the plaintiff turned his buggy into the space between the outer track and the gate and it was there struck by an approaching train, and he was either thrown out or he jumped out, there is some evidence for the jury on the question of the due care of the plaintiff, and of the negligence of the gate-keeper, who was the servant of the railroad company, and a refusal to direct a verdict for the defendant affords no ground of exception.

If the plaintiff, a traveller in a buggy on the highway, through the negligence of the gate-keeper is shut within the gates of a railroad crossing, and while there is either thrown from his buggy by an approaching train or jumps out, he suffers a physical injury, though it consists mainly of a nervous shock, and in estimating the damages the jury may take into consideration the fright and the nervous shock.

In an action against a railroad company by a traveller on the highway, who through the negligence of a gate-keeper was shut within the gates of a railroad crossing and injured by an approaching train, a request by the defendant for a ruling that "if the plaintiff knew or in the exercise of reasonable care might have known that the gates were descending or about to descend before he entered upon the crossing, but notwithstanding took the risk of entering upon the crossing, he cannot recover," was properly refused, since it did not assume that the plaintiff knew that the gates were descending or were about to descend, which in such a case is an essential element to justify the application of the doctrine of the assumption of the risk.

The doctrine of the assumption of the risk, as distinguished from the doctrine of reasonable care, in actions not between master and servant or persons having contractual relations, is confined to cases where the plaintiff knew and appreciated the danger, and voluntarily put himself in the way of it.

In an action for personal injuries the defendant requested a ruling that "there was no evidence that the plaintiff had suffered any loss in his business, or any diminution in the income therefrom, or that he has been compelled to relinquish or abandon the same, and that there can be no recovery therefor." The judge

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declined so to rule, and instructed the jury, in substance, that as the plaintiff admitted that the evidence would not justify a finding of a payment by him of one thousand dollars for nursing, or an abandonment of a business from which at the time of the accident he was realizing $2,500 a year, as alleged in the declaration, they should not find those specific sums as damages. There was some evidence that the plaintiff was prevented by his injury from attending to his business in the usual manner, and the jury returned a verdict in his favor. *Held*, that the instructions were correct, and that, as all the evidence of the nature and extent of the plaintiff's injuries was not set out in the exceptions, it could not be said that the ruling requested by the defendant should have been given.

FIELD, C. J. This is an action of tort for personal injuries, originally brought against the Connecticut River Railroad Company, the New York, New Haven, and Hartford Railroad Company, and the Boston and Maine Railroad. The plaintiff discontinued as to the Connecticut River Railroad Company; the court, after the evidence was all in, directed a verdict in favor of the New York, New Haven, and Hartford Railroad Company, and submitted the case against the Boston and Maine Railroad to the jury, who returned a verdict for the plaintiff. Main Street in Northampton runs nearly east and west, and is crossed at grade by the tracks of the Boston and Maine Railroad and the New York, New Haven, and Hartford Railroad Company, which run nearly north and south. There are two gates, one on the east side of all the tracks, and one on the west side. The distance between them is eighty-four feet. The gates are raised and lowered by means of a wheel in the gatehouse by a gateman employed and paid by the Boston and Maine Railroad, one half of whose wages is paid to that company by the New York, New Haven, and Hartford Railroad Company. The plaintiff, with his wife, was driving in a buggy on the street across these tracks when the gates were lowered by the gateman and the buggy shut in between the gates, where it was hit by a train of the Boston and Maine Railroad, running on one of its tracks. The exceptions are by the Boston and Maine Railroad.

The first exception is to the ruling of the court directing a verdict in favor of the New York, New Haven, and Hartford Railroad Company. We do not think that this ruling is open to exception on the part of the Boston and Maine Railroad. No question of liability of one of these railroad companies to the other was being tried, and no issue of this kind was raised by

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the pleadings, or was before the court. The two defendants were not adverse parties. If both companies were liable to the plaintiff, he could have sued both jointly or either separately, and neither could have complained. If there should be a judgment on the verdict in favor of the New York, New Haven, and Hartford Railroad Company, this could not be pleaded as *res adjudicata* in a suit by the Boston and Maine Railroad against that company for contribution, if the Boston and Maine Railroad is compelled to pay the judgment that may be entered on the verdict against it. We of course express no opinion whether a suit for contribution lies between joint tortfeasors in such a case as this. *Buffington* v. *Cook*, 35 Ala. 312. *Harvey* v. *Osborn*, 55 Ind. 535. *McMahan* v. *Geiger*, 73 Mo. 145. *Beveridge* v. *New York Elevated Railroad*, 112 N. Y. 1. Bigelow, Estoppel, (5th ed.) 101. *Wilson* v. *Mower*, 5 Mass. 407. *Dent* v. *King*, 1 Ga. 200.

The next exception is to the refusal of the court to direct a verdict in favor of the Boston and Maine Railroad. There was evidence for the jury that when the plaintiff entered upon the crossing the gates were up; that he looked both ways; that there was no sound of any whistle, and some evidence that no bell was heard; and that the first notice he had of any danger was when the gates began to be let down after he was part way across the tracks; that he got across all the tracks and cried out, "For God's sake raise the gate"; that the gate-keeper did not raise it; that he turned his horse and buggy to the north on the space between the easternmost track and the gate, when the train went by and hit the hind wheel of the buggy next the track; and that he was either thrown out or he jumped out. This was, we think, some evidence for the jury of due care on the part of the plaintiff and of negligence on the part of the gate-keeper, who was the servant of the defendant. *Merrigan* v. *Boston & Albany Railroad*, 154 Mass. 189. *Brow* v. *Boston & Albany Railroad*, 157 Mass. 399.

The next request is as follows: "That for mere risk, peril, mental suffering, and fright, and their consequences, the defendant was not responsible if there was no physical or bodily injury; which the court declined to give, subject to exception." The ruling given was, "that for mere fright or risk the law allows no recovery; but the plaintiff says that here was some-

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thing beyond mere fright or risk or peril. He says that the defendant in effect shut him in within the gates, by its negligence confined him within the gates; and that while he was there the train of the defendant struck his carriage, and he was thrown out upon the ground. If you should find that there was a tortious act on the part of the defendant, then you may take into account as part of the damage that the plaintiff is entitled to recover, if at all, for fright and mental suffering which he underwent, if he underwent any at all. It may be used to enhance damages, — fright caused by nervous shock; but if there was nothing more than a mere fright, peril, risk, then the plaintiff would not be entitled to recover damages for that. Suppose a person should go across a crossing; suppose there was a flagman there and there should be nothing to give any warning; suppose the person should go across, and the train should come, and he should get across safely, — not be hit; he might be subjected to a fright, and there would be no recovery for nervous shock. But if there was a tortious act, such as is complained of here, then you should take into account the fright, and the nervous shock, and the results that follow." To this ruling the defendant excepted.

The defendant criticises the phrase "tortious act," as used by the court in this ruling. We think that the meaning of this phrase in the connection in which it is used is, that if the defendant's train struck the carriage of the plaintiff, and he was thereby thrown out upon the ground, this would be a tortious act if occasioned by the defendant's negligence, and that if this act resulted in injury to the plaintiff, the defendant would be liable if the plaintiff was in the exercise of due care, and that in estimating the damages the jury might take into account not only the physical injury but also the fright and nervous shock. This ruling, we think, was either correct, or sufficiently favorable to the defendant. It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm done consists mainly of nervous shock. See *Canning* v. *Williamstown*, 1 Cush. 451; *Victorian Railway Commissioners* v. *Coultas*, 13 App. Cas. 222; *Bell* v. *Great Northern Railway*, 26 L. R. Ir. 428; *Seger* v. *Barkhamstead*, 22 Conn. 290.

The next request and ruling to which the defendant took exception is as follows: "Defendant also requested the court to

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rule, that, if the plaintiff knew or in the exercise of reasonable care might have known that the gates were descending or about to descend before he entered upon the crossing, but notwithstanding took the risk of entering upon the crossing, he cannot recover." The court declined to give the ruling, but ruled as follows: "The plaintiff was bound to use reasonable care; in passing upon that question it was proper to take into account his previous knowledge of the crossing, the use of it, his knowledge of the gates and the way in which they worked, and what they signified, — what it meant whether they were raised or lowered. A person approaching a grade crossing must look; he must use his senses; he must look and he must reason. If there are gates at the crossing it may affect the question as to how far and how much, but he must look to see whether there is a train approaching. It is a matter for you to take into account, in passing upon the degree of care, the gates being there. How were the gates when he approached the crossing? As he drove up to and upon the crossing, how were the gates? Take all the evidence, and examine it carefully, and see what Mr. Warren was doing as he drove on. What did he do? How did he conduct himself? Do you say that it was in a reasonable, prudent way? If it was, that is sufficient for this part of the case."

Whether, if the plaintiff saw the gates descending when he drove under them and upon the track, he would not be held voluntarily to have taken the risk, is a question upon which we need not express an opinion. But if the gates were "about to descend," it might be important to know how soon they would descend, and what the occasion was of their descending. The request does not assume that the plaintiff knew that the gates were descending or were about to descend, but that he either knew or might by the exercise of reasonable care have known this. The doctrine of the assumption of the risk, as distinguished from the doctrine of reasonable care in an action between persons not master and servant or not having relations by contract with each other, we think, must be confined to cases where the plaintiff knew and appreciated the danger and voluntarily put himself in the way of it. The request of the defendant in the present case is not made on this assumption; and this exception must be overruled. *Illingsworth* v. *Boston Electric Light Co.* 161 Mass. 583.

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The last request and ruling of the court appear in the exceptions as follows: "The Boston and Maine Railroad, after the court had finished the charge to the jury, asked the court to rule that there was no evidence that the plaintiff had suffered any loss in his business or any diminution in the income therefrom, or that he has been compelled to relinquish or abandon the same, and that there can be no recovery therefor, which the court declined to give, subject to exception." In the charge to the jury the court said "that counsel for plaintiff had made claim for certain damages which are not now insisted on; that in the light of the evidence there is no claim made for them now as they are stated here [in the declaration]. For instance, 'by reason thereof the plaintiff was confined to his bed for a long period, and to his house for several months, and subject to an expense of one thousand dollars for nursing.' Now, in the light of the evidence as introduced, the plaintiff does not claim that he has proved that he has paid one thousand dollars for nursing. That specific sum it is not claimed that the evidence shows was paid; so that it would not be proper for you to take that specific sum as such and assess it as damages. Further, with reference to the interference with his business: 'He was compelled to break up and relinquish a valuable business, . . . for which and from which he was then realizing $2,500 a year.' The counsel for the plaintiff does not urge upon you that you should find that specific sum, $2,500 a year. They do not claim that the evidence will justify that, and therefore you will not find that as such. I think I make my meaning clear."

By a stipulation signed by the parties, with the approval of the presiding justice, it appears that the exceptions do not set forth all the evidence upon the extent of the injury to the plaintiff. It must be assumed that there was some evidence that the plaintiff was prevented by his injury from attending to his business in the usual manner. It is agreed "that there was evidence in the case tending to show that the plaintiff had received a severe shock to his nervous system by the accident complained of, and that at the time of the trial he was still suffering from nervous prostration brought about by the said accident." We see no error in the instructions given, and as the exceptions do not set out all the evidence of the nature and extent of the

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plaintiff's injuries, we cannot say that the request for a ruling should have been granted. *Exceptions overruled.*

W. G. Bassett, for the Boston and Maine Railroad.

G. D. Robinson & W. S. Robinson, for the New York, New Haven, and Hartford Railroad.

W. S. B. Hopkins & J. B. O'Donnell, (*F. B. Smith* with them,) for the plaintiff.

GEORGIANNA NOYES & others *vs.* WILLIAM L. STONE.

Middlesex. November 21, 1894. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Right to cut Wood on Dower Estate — Conversion.

A widow who does not live upon the dower estate has no right to cut the wood thereon for sale, and if a person who is acting for the widow, after being notified by those who have the next estate of inheritance, takes and carries away the wood, he may be held to have converted it, and must pay its value at the time of conversion.

CONTRACT, with a count in tort for conversion of twenty-one cords of wood, both counts being alleged to be for the same cause of action.

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion. If Adeline Walker, who was the employer of the defendant, had the right to cut and carry away the wood or to authorize it to be done for her, judgment was to be entered for the defendant; if she had not the right, then judgment was to be entered for the plaintiffs for twenty-eight dollars and seventy-seven cents, or forty-nine dollars and seventy-seven cents, as the court should determine, the larger sum including the amount paid for cutting the wood.

R. T. Lombard, for the defendant.

J. T. Joslin & R. E. Joslin, for the plaintiffs.

FIELD, C. J. We assume that Adeline Walker, the widow, had a right of dower in the two lots of land described as the "Osborn lot," and the lot of meadow land, and that her dower

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was lawfully assigned to her by the Probate Court. She did not live upon the dower estate or upon any land of which her husband was seised during coverture. The widow had no right to cut the wood for sale; *Padelford* v. *Padelford*, 7 Pick. 152; or for use on another estate. *Cook* v. *Cook*, 11 Gray, 123. *White* v. *Cutler*, 17 Pick. 248. The plaintiffs, as having the next estate of inheritance, had a right to take the wood when severed. *White* v. *Cutler*, *ubi supra*. As the defendant, who was acting for the widow, after being notified by the plaintiffs of their title, took and carried away the wood, he may be held to have converted it, and must pay its value at the time of conversion, which is the larger sum named in the agreed statement of facts. *Phillips* v. *Allen*, 7 Allen, 115. *Moody* v. *Whitney*, 38 Maine, 174. See *Foote* v. *Merrill*, 54 N. H. 490. This is not an action in the nature of trespass upon real property. The first count is on an account annexed, and the second count is for conversion of the wood. *Judgment affirmed.*

BENJAMIN A. SHUTE, executor, *vs.* JOHN F. O. WILKINS, administrator.

Norfolk. December 11, 1894. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Proceeds of a Mortgage not new Assets of an Estate.

If, ten years after the appointment of an administrator of an estate consisting of real and personal property, the heirs at law, of whom the administrator is one, make without license of court a mortgage of certain land of which the intestate died seised, and which was included in the administrator's inventory and the proceeds of which are included in the administrator's account as an item with which he charged himself, such proceeds are not new assets within the meaning of Pub. Sts. c. 186, § 11.

CONTRACT, by the executor of the will of Nancy Whitcomb, against the administrator of the estate of Cassander S. Wilkins, upon two promissory notes, which were as follows:

"$1,000. Boston, March 3, 1875. For value received I promise to pay to the order of Mrs. Nancy Whitcomb one thousand dollars, with interest. C. S. Wilkins."

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"$500. Boston, January 18, 1875. For value received I promise to pay to the order of Mrs. Nancy Whitcomb five hundred dollars, with interest. C. S. Wilkins."

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, which appear in the opinion.

L. W. Howes & S. W. Hatheway, for the plaintiff.

A. P. Worthen, for the defendant.

FIELD, C. J. It is conceded that this action is barred by the special statute of limitations, Pub. Sts. c. 186, § 9, unless the money received from mortgaging the land in Newton is new assets, within the meaning of Pub. Sts. c. 186, § 11. Cassander S. Wilkins died on April 21, 1881, intestate; the defendant was appointed administrator, and filed his bond on May 2, 1881. He must have given due notice of his appointment, for the agreed facts find that on April 14, 1884, he filed an affidavit of notice of his appointment, by leave of court. Pub. Sts. c. 132, §§ 1, 2, 3. The estate consisted of real and personal property. In February, 1891, the heirs at law, of whom the defendant was one, made a mortgage of certain land in Newton, of which the intestate died seised, and which was included in the inventory. On this mortgage they obtained a loan of $2,500, which was included in the account which the defendant rendered as said administrator as an item with which he charged himself. At the time when they made this mortgage this land could not have been sold by the defendant as administrator by license of court to pay debts, and there is nothing to indicate that the personal estate of the deceased was not more than sufficient to pay all debts and charges of administration. The mortgage was not made by leave of court.

The proceeds of this mortgage are not assets of the estate at all, and are not liable to be taken or used to satisfy the debts of the deceased. The proceeds of the mortgage belong to the heirs personally. The fact that the defendant erroneously included these proceeds in his final account, which seems to have included a great many items relating to real estate of which he may have been the agent of the heirs, does not enlarge the rights of the plaintiff. *Alden* v. *Stebbins*, 99 Mass. 616.

Judgment for the defendant affirmed.

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T. HENRY PEARSE *vs.* SARAH W. HILL.

Suffolk. January 11, 1895. — May 24, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Judgment — Avoidance by Plea and Proof.

A judgment of a court of this Commonwealth which had jurisdiction of the subject and the parties cannot be avoided by plea and proof in an action of contract upon it.

CONTRACT, upon a judgment recovered by the plaintiff, on January 8, 1894, in the Superior Court, in an action against the present defendant upon an account annexed. At the trial in the Superior Court, before *Maynard*, J., the plaintiff offered in evidence the clerk's record of the judgment and rested. The defendant offered no evidence, and rested, and asked certain rulings not necessary to be stated. The judge refused to give any of the rulings, and ordered the jury to return a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion.

C. P. Gorely & H. H. Newton, for the defendant.

Z. S. Arnold, for the plaintiff, was not called upon.

FIELD, C. J. This action is upon a judgment of a court of this Commonwealth which had jurisdiction of the subject and of the parties. It is regular in form, and is valid between the parties until vacated or reversed. The record of the judgment put in evidence shows that the parties agreed to refer the action, and that the action was referred, and that the referee was authorized to proceed *ex parte* if either party neglected to appear after due notice. Both parties appeared before the referee by their attorneys, and several hearings were had, after which the original attorney for the defendant withdrew his appearance, and, after due notice to the defendant, the referee proceeded *ex parte* and made his report, which was accepted and confirmed by the court, and judgment entered thereon. On these facts we do not intimate that by any proceedings the judgment can be vacated or reversed. It cannot be avoided by plea and proof in this action. See *Brigham* v. *Burnham*, 12 Allen, 97. *Exceptions overruled.*

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JAMES GRINDLEY, JR., administrator, *vs.* WILLIAM T. McKECHNIE & another.

Suffolk. January 11, 1895. — May 24, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Child — Trespass.

The owner of premises, and the contractor who is erecting for the owner a building thereon, are not liable to a boy five years of age, who, without any invitation or inducement, trespasses upon the premises, falls into a trench, and dies from the effect of the injuries received thereby.

TORT. The declaration alleged that, on or about March 6, 1894, the defendant McKechnie was the owner of a certain lot of land situated on Dorchester Avenue, in Boston, near the junction of Boston Street with said Dorchester Avenue; that on or about said date the defendant Jobling was constructing for McKechnie a building on the lot, which building fronted on Dorchester Avenue, and was very close to the sidewalk of Dorchester Avenue; that in the course of construction, and prior to said date, the defendants caused a hole or trench in the earth at the rear of the building to be dug, several feet long and wide and several feet deep, which became filled with water, upon the surface of which floated pieces of board, shavings, and other material concealing the apparent danger; that the defendants knowingly, negligently, and unlawfully allowed said hole or trench to remain in this dangerous condition for several days; that said hole or trench was only about twenty-five feet from Dorchester Avenue, a much frequented street in said Boston, and access to it from the street was not obstructed by any sufficient fence or other obstacle, neither was any warning of its danger given in any way; and that on or about said date the plaintiff's intestate, a child of about five years old, while in the exercise of due care and lawfully on the premises, owing to the negligent conduct of the defendants, fell into the hole or trench, suffered great pain of body and mind, was unable to get out, and finally died, on said March 6, 1894, from the effects of falling into the hole or trench.

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The defendants demurred to the declaration, on the grounds that it did not state a legal cause of action; that it alleged no duty on the part of the defendants towards the plaintiff, nor any breach thereof; and that it showed that the injuries were sustained without the fault or default of the defendants.

The Superior Court sustained the demurrer, and ordered judgment for the defendants; and the plaintiff appealed to this court.

L. C. Southard, (*J. H. Quincy* with him,) for the plaintiff.

A. C. Clark, for the defendant McKechnie, was not called upon.

FIELD, C. J. The judgment of the Superior Court was in accordance with our decisions. *McEachern* v. *Boston & Maine Railroad*, 150 Mass. 515. *Daniels* v. *New York & New England Railroad*, 154 Mass. 349. *Sullivan* v. *Boston & Albany Railroad*, 156 Mass. 378. *Gay* v. *Essex Electric Street Railway*, 159 Mass. 238. *Judgment affirmed.*

DUNCAN B. HARRISON *vs.* FRANK E. MORAN.

Suffolk. January 14, 1895. — May 24, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Contract — Unauthorized Payment of Money.

It is no defence for a debtor, who is sued to recover a sum of money, that he has voluntarily paid the sum to a creditor of the plaintiff, unless such payment was authorized or assented to by the plaintiff.

CONTRACT to recover the sum of five hundred dollars. At the trial in the Superior Court, before *Hammond*, J., it appeared that the plaintiff and one John L. Sullivan had been partners in a theatrical business; that the defendant was in the receipt of a salary in their employ, as treasurer; that, prior to the above partnership, the plaintiff, said Sullivan, and one Barnett had been partners in a theatrical business during a tour in Australia and up to their return to San Francisco, when Barnett retired, and the plaintiff and Sullivan became equal partners; that in

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Portland, Oregon, after the return to San Francisco and the retirement of Barnett, the sum of one thousand dollars had been deposited by each partner in the hands of the defendant as treasurer, as a fund to cover any loss that might subsequently arise in the business; that shortly thereafter the plaintiff procured Sullivan to order the defendant to pay to him, the plaintiff, the sum of five hundred dollars, to meet, as was agreed, the payment of the plaintiff's check, which had theretofore been given to one Dougharty, in Australia, for the sum of five hundred dollars, in order to raise funds for the benefit of the partnership of Sullivan, Harrison, and Barnett, hereinbefore mentioned, which check was drawn on San Francisco, and was dishonored when presented, and which funds actually went to the benefit of the partnership; and that thereafter, in Pittsburgh, trouble arose between Sullivan, Harrison, and Moran, whereupon the following agreement, which was put in evidence by the plaintiff, was executed by Sullivan and Harrison, on May 5, 1892:

"It is hereby agreed by and between the parties hereto that the sum of one thousand dollars, now in the hands of Mr. Sullivan's representative, shall be and remain in his said hands, and at the termination of the season, June 4, 1892, the said sum (less any bills or claims against said Sullivan and Harrison as partners) shall be equally divided between the parties hereto.

"It is further agreed between the parties hereto that each shall name a representative to whom shall be paid the portion coming to each of the parties hereto from the engagement in the city of Pittsburgh, Pa., commencing this day, and from the engagements in the cities of Philadelphia, Brooklyn, and Boston.

"It is also agreed that the shares or interest of each of the parties hereto shall be fifty per centum of the net earnings of the play. The bills for salaries, expenses, etc. of the company shall be paid on presentation, and shall be borne in equal proportion by the parties hereto.

"It is hereby expressly agreed by and between the parties hereto that this agreement shall cease and determine in the city of Boston, Mass., on the fourth day of June, A. D. 1892.

"It is further agreed that the receipts shall be divided nightly in accordance with the terms of the foregoing agreement; and it is further agreed that the salaries, bills, and expenses contracted

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for running the show shall be paid out of the receipts by the representatives of the parties hereto."

The following receipt signed by the defendants was put in evidence by the plaintiff: "Pittsburgh, May 6th, 1892. Received of Duncan B. Harrison the sum of Five Hundred (500) Dollars to be retained by him (as a part of a permanent fund) until June 4th, 1892, as per articles of agreement made and executed by and between Sullivan and Harrison, dated Pittsburgh, May 5th, 1892."

The plaintiff further testified that he had demanded the money and it had never been paid, and that his cause of action proceeded upon the above receipt. Thereupon the defendant offered to show that the receipt was given in the course of the business, not for money actually paid in, but for the balance of the money remaining at that time in his hands, out of the sinking fund before referred to, which had been deposited in Portland, Oregon; that subsequently to the giving of the receipt, and on or before June 4, 1892, when, as the plaintiff stated, he made his demand, Sullivan learned by cable, and so informed the plaintiff, that he, the plaintiff, had not paid said check, and had not paid the money borrowed thereon as aforesaid in Australia, and ordered and directed the defendant not to pay said money to Harrison, and demanded the money of the defendant himself, and that the defendant thereupon paid it to Sullivan as a partner of the plaintiff; but it was not contended that this payment was by the knowledge and consent of the plaintiff; nor was it contended that the amount was withheld on any other ground than the non-payment of the check or the money borrowed thereon.

The judge excluded the evidence, and ordered a verdict for the plaintiff; and the defendant alleged exceptions.

H. V. Cunningham, for the defendant.

C. R. Elder, for the plaintiff.

FIELD, C. J. The defendant is clearly liable to the plaintiff in the sum of $500, unless the payment of it to Sullivan under the facts offered in evidence relieved the defendant of liability. The contention is, that, before the agreement of May 5, 1892, was executed between the plaintiff and the defendant as partners, Sullivan, Harrison, and one Barnett had been partners,

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and as such owed one Dougharty $500; and that Sullivan ordered the defendant to pay out of a deposit fund of $2,000, furnished in equal parts by the plaintiff and Sullivan, $500 to the plaintiff, that the plaintiff might pay the debt due to Dougharty; that the plaintiff received this money, but did not pay the debt; and that therefore Sullivan had the right to demand of the defendant in this action the $500 held by him under the agreement of May 5, 1892, for the benefit of the plaintiff. The defendant offered evidence that, on Sullivan's demand, he paid this sum to Sullivan, although it was not contended that this was done with the knowledge or consent of the plaintiff. The state of the accounts between Sullivan and the plaintiff, arising out of transactions occurring between them before the execution of the agreement of May 5, 1892, does not appear, but even if it had appeared that the plaintiff owed Sullivan $500 on account of these transactions, as they were not within the scope of that agreement, the defendant had no right to pay to Sullivan, without the plaintiff's assent, the debt which the plaintiff owed to Sullivan, out of money which the defendant held under that agreement, and for which he had given to the plaintiff the receipt put in evidence. There is nothing in the agreement or receipt which authorizes the payment of such a debt out of the money held by the defendant under the agreement. It is no defence for a debtor that he has voluntarily paid to a creditor of the plaintiff what he owed the plaintiff, unless such payment was authorized or assented to by the plaintiff. Credits sometimes can be attached and taken on execution, but without legal process a debtor cannot compel the person to whom he is indebted to assent to the payment of the debt to a creditor of that person.

Exceptions overruled.

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COMMONWEALTH *vs.* CALVIN FULLER.

Norfolk. March 6, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Adultery — Indictment — Continuando — Duplicity — Surplusage — Trial — Election by Prosecution of Occasion relied on.

An indictment charging the defendant with the crime of adultery on July 1, 1894, "and on divers other days and times between that day" and June 5, 1894, is bad, because it charges the offence with a *continuando*, and also because it is objectionable for duplicity; and the allegation of continuance, being sufficient in form, cannot be rejected as surplusage.

Where it appeared that, at the trial in the Superior Court of an indictment for adultery, evidence was introduced of a succession of acts of familiarity between the defendant and his paramour extending over more than a year, that the presiding judge declined to compel the prosecution, either at the beginning of the trial or at the close of its testimony, to elect on which occasion it would rely, that at the close of all the testimony it elected to rely on one of the earliest occasions of which there was any evidence, and that the judge treated the evidence relating to subsequent occasions as indicative of an adulterous disposition, without affording an opportunity to the defendant to object to it as too remote, this court deemed it proper to say that the trial was conducted irregularly, and without due regard to the rights of the defendant.

FIELD, C. J. This is an indictment containing but one count, charging that the defendant, "on the first day of July, in the year of our Lord eighteen hundred and ninety-four, at Medfield, in the county of Norfolk aforesaid, and on divers other days and times between that day and the fifth day of June in the year of our Lord eighteen hundred and ninety-four, did commit the crime of adultery with one Marion Brown, by then and there having carnal knowledge of the body of the said Marion Brown, the said Calvin Fuller being then and there a married man, and then and there having a lawful wife alive other than the said Marion Brown, and the said Calvin Fuller and Marion Brown not being then and there lawfully married to each other."

The defendant duly filed a motion to quash the indictment for these reasons: "1. Because the said indictment does not set forth any offence known to the law in any legal or sufficient manner. 2. Because the said indictment is bad for duplicity in charging more than one offence in the same count."

We think that the indictment should be quashed for each of

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the reasons alleged. Adultery is not a continuing offence. Each act of adultery constitutes a separate offence.

This is not a case where the *continuando* can be rejected as surplusage on the ground that the form of the allegation is imperfect and insufficient, because here the allegation is sufficient in form. If it is permissible to charge adultery with a *continuando*, then the Commonwealth should have been limited in its proof of substantive acts to the time alleged, and the Commonwealth ultimately relied upon an act which occurred nearly a year before any time alleged. The real difficulty in the present case is that the defendant is charged in one count with the commission of many acts of adultery with the same person on different days and times. *Commonwealth* v. *Adams*, 1 Gray, 481. *State* v. *Temple*, 38 Vt. 37.

We deem it proper to say that the trial in this case seems to us to have been conducted irregularly and without due regard to the rights of the defendant. The Commonwealth was permitted to introduce evidence of acts of familiarity between the defendant and Marion Brown at many different times within six years before the finding of the indictment, and was not compelled to elect the time or occasion upon which it relied until the close of all the evidence in the case. The court refused to compel the Commonwealth to specify any time or occasion, either at the beginning of the trial or at the close of the Commonwealth's testimony, and the testimony related to a succession of acts of familiarity extending over more than a year. The defendant when putting in his testimony could not know upon what occasion the Commonwealth would rely. At the close of all the testimony the Commonwealth chose to rely upon the occasion of July 13, 1893, which was one of the earliest occasions concerning which there was any evidence. The evidence relating to other occasions was treated by the court as evidence of an adulterous disposition; but there was no opportunity for the defendant to object to it on the ground that it related to occurrences which happened long after the occasion relied upon by the Commonwealth had passed. It is unnecessary, however, to express in detail an opinion upon the various exceptions taken at the trial, as the indictment must be quashed. *Exceptions sustained.*

J. J. Feely & A. C. Smith, for the defendant.

R. O. Harris, District Attorney, for the Commonwealth.

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JOHN L. REARDON *vs.* MINNIE J. MURPHY.

Suffolk. March 6, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Restriction in Deed — Piazza — Building.

A piazza, covered by its own roof, and attached to the front of a house the front line of which is twenty feet from the street, is a "building" within the terms of a restriction that "no building . . . shall be placed at a less distance than twenty feet from" the street.

LATHROP, J. This is a bill in equity to enforce a restriction contained in a deed of land, conveyed by the plaintiff to the defendant. A decree was entered for the plaintiff by a single justice of this court, and the case comes before us on report. The words of the restriction are as follows: "No building erected on said premises shall be placed at a less distance than twenty feet from said easterly line of Parsons Street."

The front line of the main body of the house was twenty feet from the street. Attached to the house, and extending along the entire front, was a piazza about eight feet wide, encircled by a railing, and having a roof supported by posts. The whole of the piazza was within the restricted space.

The question is, Was the piazza a "building" within the terms of the restriction? We have no doubt that it was, and that the plaintiff was entitled to the relief granted by the single justice.

In *Attorney General* v. *Gardiner*, 117 Mass. 492, a structure three feet high, erected within a restricted space for coal bins, while considered as no part of the defendant's house, was held to be of itself a building. The same has been held as to a pavilion. *Buck* v. *Adams*, 18 Stew. 552. See also *Blakemore* v. *Stanley*, 159 Mass. 6.

Bay windows are undoubtedly part of a house, and cannot extend over restricted ground. *Sanborn* v. *Rice*, 129 Mass. 387, 397. *Payson* v. *Burnham*, 141 Mass. 547. *Manners* v. *Johnson*, 1 Ch. D. 673.

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In *Bagnall* v. *Davis*, 140 Mass. 76, the restriction was that no building shall be erected within twenty feet of a certain street. The front line of the defendant's house was twenty feet from the street. In front of this was a piazza, the front line of which was fourteen feet from the street. The piazza was covered by a continuation of the roof of the building, which extended to within less than fourteen feet of the street. In the roof was a projecting dormer window, by means of which a portion of a room in the second story, seven feet and a quarter wide, out of which this window opened, was carried to a point seventeen feet from the street. The posts which supported the projecting portion of the second story were six inches in diameter, and supported by brick piers resting on the ground. The defendant in the case at bar contends that the court in *Bagnall* v. *Davis* did not order the piazza disturbed. But while the opinion does not state in terms that the posts were within the restriction, it does say that the "portions of the roof and of the dormer window which extend beyond the front wall towards the street are extensions of the building, and a part of it within twenty feet of the street, within the meaning of the restriction." The roof of the piazza was certainly disturbed, and we cannot suppose that the court intended that the posts and their foundations, so far as they were above ground, were not within the restriction.

We can see no ground for a distinction between a piazza covered by an extension of the main roof of a house, and one covered by its own roof and attached to the house; and we consider the case of *Bagnall* v. *Davis* as decisive of the case at bar.

The doctrine of *Brande* v. *Grace*, 154 Mass. 210, and *Lynch* v. *Union Institution for Savings*, 159 Mass. 306, does not apply.

Decree affirmed.

S. L. Whipple & R. W. Frost, for the defendant.

R. S. Gorham, for the plaintiff.

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EDWARD B. MERRILL & another, executors, *vs.* LEONARD F. BECKWITH.

Suffolk. March 6, 7, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Equity — Specific Performance — Statute — Jurisdiction.

The provisions of the Pub. Sts. c. 141, § 22, as to selling and conveying in certain cases property held in trust by minors, lunatics, etc., are not applicable to a person who has agreed to purchase land in this Commonwealth, and this court has no power under the statute to compel him to accept a conveyance where it cannot bind him personally by its decree.

LATHROP, J. This is a bill in equity for the specific performance of an alleged contract for the purchase of a parcel of land in this Commonwealth. The defendant, in 1889, leased of the plaintiffs the island Nashawena in Buzzard's Bay, by an indenture containing a covenant that, if during the term the defendant should be minded to purchase the premises for sixty-five thousand dollars, payable fifteen thousand dollars in cash and the rest by his bond secured by mortgage as therein specified, and should pay or tender the fifteen thousand dollars to the plaintiffs with intent to purchase, then the plaintiffs, in consideration of that sum with the bond and mortgage so tendered, would convey the premises. This lease was renewed, together with the option of purchase, on May 1, 1892, for two years.

On September 10, 1893, the defendant wrote to one of the plaintiffs a letter containing the following: "I have concluded to avail myself of my option to purchase the island Nashawena, and as soon as my lawyers have examined titles and make abstracts I shall be ready to carry it out."

The defendant is a citizen and resident of New York, and there has been no sufficient service upon him in this Commonwealth. Service has been made by publication, and by delivery of a copy to the committee of the property of the defendant in New York, where he had been adjudged to be a lunatic.

It is obvious that no personal decree can be rendered against the defendant. In *Spurr* v. *Scoville*, 3 Cush. 578, it was held

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that a person who had agreed to purchase land in this Commonwealth could not maintain a bill in equity against the person who had agreed to sell it for specific performance, where the defendant resided out of the Commonwealth and had not been served with process here. This was put on the ground that, the suit being *in personam*, there was no party defendant before the court, and the court was unable to proceed to any decree.

The plaintiffs, however, contend that the case at bar falls within the purview of the Pub. Sts. c. 141, § 22. This statute was first passed in 1845, and was re-enacted in the General Statutes. St. 1845, c. 64. Gen. Sts. c. 100, § 15. It was in force when *Spurr* v. *Scoville*, above cited, was decided, but was not referred to by the court. The language of the statute as it now stands is as follows: "When a person seised or possessed of real or personal estate, or of an interest therein, upon a trust, express or implied, is under the age of twenty-one years, insane, out of the Commonwealth, or not amenable to the process of any court therein which has equity powers, and when in the opinion of the Supreme Judicial Court or of a probate court it is fit that a sale should be made of such estate or of an interest therein, or that a conveyance or transfer should be made thereof in order to carry into effect the objects of the trust, the court may by decree direct such sale, conveyance, or transfer to be made, and may appoint some suitable person in the place of such trustee to sell, convey, or transfer the same in such manner as it may require. If a person so seised or possessed of an estate, or entitled thereto upon a trust, is within the jurisdiction of the court, he or his guardian may be ordered to make such conveyances as the court may deem proper."

The case of *Felch* v. *Hooper*, 119 Mass. 52, was similar to that of *Spurr* v. *Scoville*, with these additional facts. The plaintiff had paid or tendered the consideration, and had by the defendant's permission entered upon the land and made improvements thereon. Under these circumstances it was held that he had an equitable title to the land which he could enforce by a conveyance made by a trustee appointed by the court, under the Gen. Sts. c. 100, § 15.

In *Desper* v. *Continental Water Meter Co.* 137 Mass. 252, it was held that this court had no jurisdiction of a bill in equity

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by a citizen of this Commonwealth against a foreign corporation having a usual place of business here for specific performance of an agreement to assign and convey letters patent of the United States, and personal chattels situated here, where there was no valid service upon the corporation; and it was said by Mr. Justice Field, in delivering the opinion of the court, "We are of opinion that this case is not within the purview of the Pub. Sts. c. 141, § 22."

The distinction between these cases seems to be that where the relation between the parties is simply that of contract, namely, where one agrees to sell and the other to buy, there is correctly speaking no trust created, but merely "a contract of sale and purchase of which a court of equity will under certain circumstances decree a specific performance." But where the person agreeing to purchase has been allowed by the owner to enter upon the land and make improvements, there is a trust created in his favor. See *Rayner* v. *Preston*, 18 Ch. D. 1, 6, 10, 11, 13; *In re Cuming*, L. R. 5 Ch. 72; *In re Colling*, 32 Ch. D. 333, 336.

However this may be, we are of opinion that the statute is not applicable to a person who has agreed to purchase; and that the court has no power under it to compel him to accept a conveyance, where the court cannot bind him personally by its decree. *Bill dismissed.*

T. M. Stetson & E. D. Stetson, for the plaintiffs.

J. L. Thorndike, (*R. E. Forbes* with him,) for the defendant.

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NEW ENGLAND TRUST COMPANY, trustee, *vs.* MARY W. PITKIN & others.

Suffolk. March 7, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Photographic Copy of Will — Devise and Legacy — Trust — Disposition of Income.

The provision in a will, "The ballance of my estate is to be kept in trust by the New England Trust Company of Boston, one half the income from which is to be paid to my wife, till the youngest of my children, shall have reach their maturity. After which my wifes portion shall be one forth said income, the ballance being divided equally between my children," must be construed to mean, irrespective of any conclusion derived from an examination of a photographic copy of the will, that until the youngest of his children reached maturity his wife while she lived should receive one half of the income of the fund, and that the balance of the income, that is, the other half, should be equally divided among the children, and that after the youngest of his children reached maturity his wife while she lived should receive one fourth of the income, and that the balance of the income, that is, three fourths, should be equally divided among his children until the last surviving child died.

PETITION IN EQUITY, by the trustee under the will of Charles L. Pitkin, against the widow of the testator and other legatees, to obtain the instructions of the court as to the construction of the will. Hearing before *Lathrop*, J., who reported the case for the determination of the full court. The facts appear in the opinion.

E. L. Dresel, for the petitioner, read the papers in the case.

F. Rackemann, for the minor children of the testator.

FIELD, C. J. The only question upon which the petitioner is now entitled to receive the instructions of the court relates to the disposition to be made, under the second paragraph of the will, of one half of the income of the trust estate during the life of the wife, and until the youngest of the testator's children reaches maturity. This paragraph is as follows: "The ballance of my estate is to be kept in trust by the New England Trust Company of Boston, one half the income from which is to be paid to my wife, till the youngest of my children, shall have reach their maturity. After which my wifes portion shall be one

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forth said income, the ballance being divided equally between my children." We have examined the photographic copy of the will annexed to the report. This copy shows that the testator in writing his will often used in punctuation what seems to be a period for what should be a comma, and that the initial letter of the word "after" following the word "maturity" in the second paragraph is probably a small and not a capital letter. Even without this examination, we think it apparent that the testator intended that until the youngest of his children reached maturity his wife while she lived should receive one half of the income of the fund, and that the balance of the income, that is, the other half, should be equally divided among his children, and that after the youngest of his children reached maturity his wife while she lived should receive one fourth of the income, and that the balance of the income, that is, three fourths, should be equally divided among his children, until the last surviving child died. We cannot now determine the disposition which should be made of the trust property, or of the income, if the wife should die while some of the children were living, or if all the children should die while the wife was living. *Instructions accordingly.*

DANIEL CASEY *vs.* CITY OF MALDEN.

Middlesex. March 11, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Child — Negligence — Due Care.

A boy of average intelligence, between nine and ten years of age, cannot recover for personal injuries sustained by falling into a man-hole in the public street of a city, if he voluntarily adopted a dangerous method of approaching the man-hole, and his injury was a natural consequence of his carelessness.

TORT, for personal injuries occasioned to the plaintiff by an alleged defect in a highway in the defendant city. Trial in the Superior Court, before *Maynard*, J., who ruled that, upon the whole evidence, the plaintiff could not recover, and directed a

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verdict for the defendant, and reported the case for the determination of this court. If the ruling was correct, the verdict was to stand; otherwise, a new trial was to be ordered. The facts appear in the opinion.

A. J. Daly, for the plaintiff.

O. H. Carpenter, for the defendant.

LATHROP, J. The plaintiff, a boy between nine and ten years of age and of average intelligence, was injured by falling into a man-hole of a sewer, being constructed by the Metropolitan Sewerage Commissioners, acting under the St. of 1889, c. 439. The sewer was in a public street of the defendant city, and the man-hole, which was about three feet in diameter, had been left open and unguarded from eight o'clock in the morning until the time of the accident, which was between three and four o'clock in the afternoon. The plaintiff walked backward from the house where he lived, a distance of twenty-five or thirty feet, looking up at a boy and a girl on the roof of the house adjoining the one where he lived, until he fell into the man-hole. The mother of the plaintiff testified at the trial, but only as to the length of time the man-hole was open. There is nothing in her testimony to show any care exercised by her towards the plaintiff, or that she cautioned the plaintiff in regard to it. If the boy was too young to be trusted upon the street alone, the evidence does not show any exercise of care on the part of the mother, and this would prevent his recovery.

We assume, however, that a boy of average intelligence, between nine and ten years of age, may be trusted upon the street alone; and the question then is whether the judge rightly ruled that, upon the whole evidence, the plaintiff could not recover. We are of opinion that the ruling was right. The jury would not have been warranted in finding, upon the evidence, that the plaintiff was in the exercise of due care. The evidence was undisputed. The hole was in plain sight, if the plaintiff had looked. He voluntarily adopted a dangerous method of crossing a public street; and his injury was a natural consequence of his carelessness. *Messenger* v. *Dennie*, 137 Mass. 197, and 141 Mass. 335. *Gay* v. *Essex Electric Street Railway*, 159 Mass. 238.

Verdict for the defendant to stand.

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NELSON S. BARTLETT & others, executors & trustees, petitioners.

Suffolk. March 11, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Devise and Legacy — Perpetuity — Valid Public Charities — Trust for Sale of Real Estate — Promissory Notes — Gift — Photographic Copy of Will — Payment of and Interest upon Legacies — Payment of Expenses of Administration and of Contest over Probate of a Will.

A provision in a will giving an estate to trustees in trust to be conveyed in fee simple to A. and his descendants, together with the income of a fund also given in trust, the income to be used by A., his heirs and assigns, exclusively for the purpose of keeping the estate as well as the testator's cemetery lot and monument always in repair, creates, so far as it is intended for the purpose of keeping the estate in repair a private perpetual trust, and the estate, having been conveyed to A., becomes absolutely his property, and the fund also becomes absolutely his property so far as it is intended to be used in keeping the estate in repair; but the trust to keep the burial lot and monument always in repair is a good perpetual trust under our statutes, and, it being conceded that a certain sum is sufficient for the purpose, the trustees should retain in their hands that sum, or deposit it with the treasurer of the city, the income thereof to be used to keep the burial lot and monument always in good order.

A devise of real estate to trustees to be cut up into "smaller lots and sold for pleasant homes," and of two wharves to be sold or to be let to the persons who should build on the lots, does not create a charitable trust, but merely a trust for sale of real estate.

A devise of "The Chapel lot . . . to be retained and used when the growth of the village population will justify the building of a larger and more pretentious Village Chapel," and bequest of a sum of money for the purpose ultimately of erecting upon the Chapel lot a chapel to be used by the inhabitants of the village for religious meetings and a Sunday School, are good public charitable gifts.

A gift of real and personal property for a public park is a good public charitable gift.

A testator by his will gave in trust the sum of one hundred and twenty thousand dollars, including a note of twenty thousand dollars held on demand, the income "to be paid semi-annually to the Board of Trustees of the Gloucester Lyceum, and Sawyer Free Library as part of the endowment fund for its support." About five years before the execution of the will the testator delivered to the treasurer of the Lyceum and Library, a corporation, a promissory note for twenty thousand dollars, signed by him and payable on demand to the order of the Board of Trustees of the corporation with interest, which interest was paid by him to the time of his death. *Held*, that the note, being signed by the testator, could not be the subject of a gift; that it was simply a written promise, without consideration, and could not be enforced against his estate; that the language of the will showed that the bequest was of the sum of $120,000, of which the promise

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contained in the note should be a part; that the note should be cancelled; and that the bequest of $120,000 was a good public charitable bequest.

A bequest "of Forty Thousand Dollars, in trust, including the notes of Two Thousand Dollars, already given," the income to be paid "to the Treasurer of the Female Charitable Association of Gloucester, . . . to be devoted to the charitable and benevolent objects for which this society has so long and so cheerfully labored, relieving the destitute and comforting the sick," is a good public charitable bequest of forty thousand dollars; and the notes signed by the testator cannot be the subject of a gift, and, being simply written promises, without consideration, cannot be enforced against his estate, and must be cancelled.

A bequest to the government of a city of money in trust to be called the "S. Drawing and Music Fund, and the income only to be used to assist in defraying the expenses of competent teachers in these two departments of our Public Schools under the direction of the School Committee," and if either or both should be discontinued "the income shall then be used to establish a branch or Nautical School, to teach young mariners the art or science of Navigation," is a good public charitable bequest.

A bequest to the government of a city of money in trust, the income to be applied by the School Committee in providing medals for meritorious scholars in the High and Grammar Schools, and to be used in setting out ornamental trees on the waysides, or within the school-house grounds or other public places, is a good public charitable bequest.

A bequest of money to the Trustees or the Treasurer of a Public Library in trust to be called the "S. Fund," the income to be used for books, is a good public charitable bequest.

Bequests of money to the Parish Committee and the Treasurer of the First Parish Unitarian Society of a city in trust, the first to be called "Parsonage Fund," the income to "be allowed to accumulate until such time as the said officers and the members of said Society shall deem it best, to provide a parsonage Home for their minister," the second to be called the "Salary Fund, the income only to be used in paying the minister's salary," the third without any particular name, "the income only to be used in purchasing Sabbath School books," and the fourth to be called the "Girls Industrial School Fund," the income "to be paid to the chief manager of said School." are all good public charitable bequests.

A bequest of money in trust, "the income only to be paid semi-annually to my nephew A. and his heirs," is an attempt to create a private perpetual trust, and the money is to be paid to A. absolutely.

The provisions of the paragraphs in the will which have been numbered for convenience from fifty to fifty-two, directing, among other things, the payment of the average annual income in the place of interest to certain institutions, relate only to those institutions mentioned in the forty-eighth and forty-ninth paragraphs, that conclusion being justified by the phraseology of the will and by the aid derived from the examination of a photographic copy of it.

A provision in a will which extends the time of payment of legacies to certain institutions, and which was intended to affect only the convenient and most profitable management of the estate, does not take the legacies generally out of the operation of the rule that legacies draw interest at the rate of six per cent per annum from one year from the death of the testator.

A bequest in trust, within Pub. Sts. c. 136, §§ 24, 25, which provide that the income shall be payable from the death of the testator, and shall be apportioned in case of the death of the life tenant, draws interest at the rate of six per cent per an-

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num, simple interest, from the death of the testator; and the life tenant having died after the testator, there being no provision as to the termination of the trust, the interest up to the time of his death is payable to his estate, and the principal fund belongs to the residue of the testator's estate.

A testator provided by his will that, if at his decease his property should be depressed in value, the executors were to defer the payment of legacies to certain institutions "until such time as in their good judgment it would seem best to dispose of as much of said properties as would be required to pay these legacies in full, not exceeding five years," and directed that the average annual income from his property "shall be considered, if less, an equitable sum to be divided and paid" to the institutions. *Held*, that interest on the amounts given from one year from the death of the testator for the next four years was to be reckoned at the rate of the average annual income received from the property if less than six per cent, and after the expiration of five years from the death of the testator at the rate of six per cent, simple interest, per annum.

The expenses of administration, including the expenses of the contest over the probate of a will, so far as they are made a charge upon the estate, are to be taken from the corpus thereof.

PETITION, by the executors and trustees under the will of Samuel E. Sawyer, to obtain the instructions of the court as to the construction of the will. The case was heard by *Lathrop*, J., and reported for the consideration of the full court. The facts appear in the opinion.

E. T. Burley, for the petitioners, read the papers in the case.

W. G. Russell, for Massachusetts Society for Prevention of Cruelty to Animals, and forty-nine other charitable corporations.

S. Lincoln, for the Trustees of Gloucester Lyceum and Sawyer Free Library.

A. Hemenway & C. B. Barnes, Jr., for Frederic H. Sawyer and others.

C. A. Russell, for the Attorney General and City of Gloucester.

G. Cunningham, for the Female Charitable Association of Gloucester.

S. D. York, for the Town of Rockport and Trustees of Rockport Public Library, submitted the case on a brief.

H. F. Hurlburt & E. T. McCarthy, for the First Parish Unitarian Society, also submitted the case on a brief.

J. J. Flaherty, for Lillie M. Sawyer, executrix.

FIELD, C. J. It is convenient to consider the questions in the order in which they arise in the will itself, using for convenience the numbering of the paragraphs made by the petitioners. In the first paragraph the testator gives the burial lot to his execu-

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tors and trustees "who will also have charge of the Homestead Fund, the income of which in part, shall be used to keep the lot and the monument always in good order," etc. This Homestead Fund appears by the fourth paragraph to be a sum of $12,000, given to the executors and trustees "to be securely invested in first mortgages on real estate at about fifty per cent of a fair valuation, Government, State, City or Town bonds, or any other substantial securities, undoubted, and the income thereof only to be paid over to Captain Charles Abram Sawyer, my nephew, his heirs and assigns, semi-annually January and July if practicable. It being intended that the income of this legacy shall be exclusively used for the purpose of keeping the old Homestead and the other buildings, always in good repairs and the grounds in good order and condition as well as the Cemetery Lot as before mentioned. The buildings to be kept constantly insured."

By the fifth paragraph the Brookbank estate is given to the executors and trustees in trust, "to be conveyed in fee simple to my nephew Capt. Charles A. Sawyer of Gloucester, and his descendants, together with the income of 'Homestead Fund,' which is to be used exclusively for the purpose as before stated, it being my earnest desire and request that the Old Sawyer Homestead, which has been in our family one hundred and seventy-five years, with all the land now belonging to it, in one lot, shall be kept in good repair as before requested, and thus be handed down from generation to generation unincumbered by lien or mortgage as a precious heirloom of the Sawyer Family." The Brookbank estate, which we understand to be the Homestead estate, has been conveyed by said executors and trustees to Charles A. Sawyer in his lifetime. He has since deceased, and the executrix of his will is a party to these proceedings. It is obvious that this trust of $12,000, so far as it is intended for the purpose of keeping the Old Homestead always in good repair, cannot be carried into effect. It is an attempt to create a private perpetual trust. The Homestead estate, having been conveyed to Charles A. Sawyer, his heirs and assigns, became absolutely his property, and the $12,000, the income of which was to be paid to him, his heirs and assigns, also, we think, became absolutely his property, so far as it is a sum intended to be

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used in keeping in good repair the Old Homestead. *Smith* v. *Harrington*, 4 Allen, 566. *Harlow* v. *Cowdrey*, 109 Mass. 183. *Bent* v. *Cullen*, L. R. 6 Ch. 235. The only question that requires consideration is whether so much of this $12,000 as is necessary to keep the burial lot and the monument always in good order can be separated from the remainder and sustained as a perpetual trust. We think that a trust to keep the burial lot and the monument of the testator always in good order is under our statutes a good perpetual trust, and that, as it is conceded that $500 is sufficient for the purpose, the executors should retain in their own hands $500, or deposit this sum with the treasurer of the city of Gloucester, the income of which should be used to keep the burial lot and monument always in good order; the remainder of this legacy of $12,000 should be paid to the executrix of the will of Charles A. Sawyer. *Green* v. *Hogan*, 153 Mass. 462. *Sears* v. *Hardy*, 120 Mass. 524.

Of the real estate given to the executors and trustees by the sixth paragraph, some is plainly intended to be cut up into "smaller lots and sold for pleasant homes," and the Large Stone Wharf and the old Webber Wharf seem to be intended to be sold or to be let to the persons who shall build on the lots first mentioned. As to this real estate there is no charitable trust; it is merely a trust for sale. The Chapel lot is a vacant lot in that part of the city of Gloucester called Cove Village. The language of the will is: "The Chapel lot, having a frontage of about seventy feet on Western Avenue, is to be retained and used when the growth of the village population will justify the building of a larger and more pretentious Village Chapel."

The nineteenth paragraph of the will is as follows: "I give and bequeath to my Executors and Trustees, the sum of Four Thousand Dollars, in trust, to be safely invested as aforesaid and the *the* income be allowed to accumulate until such time, when it would seem to be advisable to erect a more commodious Village Chapel in Fresh Water Cove, a portion of the income may be used in purchasing Sabbath School Books; to keep the building and the grounds in good order, and for its general support." We understand that Fresh Water Cove is the cove on which is situated Cove Village, in which is the Chapel Lot, and that it appears that in this village, although not on the Chapel Lot,

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there was at the date of the will, and still is, a school-house sometimes used by the inhabitants of the village for religious meetings and a Sunday School. We think it evident that the testator intended to give this Chapel Lot and this four thousand dollars for the purpose ultimately of erecting upon the Chapel Lot a chapel to be used by the inhabitants of Cove Village for religious meetings and a Sunday School. This, we think, is a good public charitable gift. *McAlister* v. *Burgess*, 161 Mass. 269. *Fairbanks* v. *Lamson*, 99 Mass. 533. *Tainter* v. *Clark*, 5 Allen, 66.

The seventh paragraph of the will is as follows: "None of the numerous Wood Lots now owned by me, or hereafter purchased, are to be sold, or in any way disposed of, but to be retained by my Executors and Trustees for the protection and beauty of the Cove Village, now so called but sometime in the near future, to be laid out handsomely with driveways and pleasant rural walks, and then dedicated in the name of 'Ravenswood Park,' and then I hope the village will also be called 'Ravenswood.'"

The fifteenth paragraph is as follows: "I give and bequeath to my executors and trustees the survivors and survivor of them and their successors in the office the sum of Sixty Thousand Dollars in trust, to be safely invested as heretofore directed, and the income only to be used in developing and beautifying the present 'Ravenswood Park' grounds by clearing away the dead wood and other incumbrances, and for the purchasing of other contiguous wood-lands, that may be essential in perfecting its present form and completion." These wood lots are all within the limits of the city of Gloucester. A gift of real and personal property for a public park is, we think, a good public charitable gift. *Attorney General* v. *Abbott*, 154 Mass. 323. Pub. Sts. c. 116, §§ 35, 36. St. 1882, c. 154.

The first clause of the thirteenth paragraph is as follows: "I give and bequeath to my Executors and Trustees, the survivors and survivor of them and their successors in the office, to be held by them in trust, the sum of One Hundred and twenty Thousand Dollars including the note of Twenty Thousand Dollars, now held by them on demand, to be safely invested, as heretofore directed, and the income only of said sum, to be paid semi-annually to the Board of Trustees of the Gloucester Lyceum

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and Sawyer Free Library as part of the endowment fund for its support." It appears that on July 1, 1884, "said testator executed and delivered to the Treasurer of the Gloucester Lyceum and Sawyer Free Library, a corporation, a promissory note signed by the said testator, payable on demand to the order of the Board of Trustees of said corporation and their successors in office for $20,000, with interest at the rate of six per cent per annum, payable semi-annually, and being the same note referred to in paragraph 13 of said will. The interest was regularly paid by the testator on said note down to the time of his death. Said corporation claims said note was delivered by the testator as a gift *inter vivos*. There never was any consideration for said note, and the same is still held by said Treasurer, who, in behalf of said Board of Trustees and said corporation, claims interest thereon according to the terms of said note." The note, being a note signed by the testator, could not be the subject of a gift. *Parish* v. *Stone*, 14 Pick. 198. It was simply a written promise of the testator, without consideration, and could not be enforced against his estate. The language of the thirteenth paragraph shows that the testator did not intend to give to his executors and trustees in trust $120,000 in addition to the amount of money promised in the note, but $120,000 of which the promise of $20,000 contained in the note should be a part. This bequest is of the sum of $120,000, and the note should be cancelled. This is a good public charitable bequest.

The first clause of the fourteenth paragraph of the will is as follows: "I give and bequeath to my Executors and Trustees, the survivors and survivor of them and their successors in the office, the sum of Forty Thousand Dollars, in trust, including the notes of Two Thousand Dollars, already given, to be safely invested as heretofore directed, and the income only to be paid semi-annually to the Treasurer of the Female Charitable Association of Gloucester, (which at present occupy rooms set apart in the Library Building,) to be devoted to the charitable and benevolent objects, for which this society has so long and so cheerfully labored, relieving the destitute and comforting the sick." We understand that the facts concerning this paragraph are similar to those considered under the thirteenth paragraph, and the construction should be the same.

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We do not understand that it is seriously contended that the bequests in the sixteenth, seventeenth, eighteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth paragraphs are not valid bequests. These bequests are as follows:

16. "I give and bequeath to the Government of the City of Gloucester, the sum of Ten Thousand Dollars, in trust, to be securely invested, and to be called the 'Sawyer Drawing and Music Fund,' and the income only to be used to assist in defraying the expense of competent teachers in these two departments of our Public Schools under the direction of the School Committee. If either or both of these branches at any time should be discontinued, I desire that the income shall then be used to establish a branch or Nautical School, to teach young mariners the art or science of Navigation.

17. "I also give and bequeath to the said City Government the sum of Three Thousand Dollars in trust, to be invested as aforesaid and the income only to be applied through the hands of the School Committee, in providing medals, to be awarded to meritorious scholars in the High and Grammar Schools, — Courtesy and exemplary conduct to be considered; If the income should be more than sufficient, I desire that the balance shall be used for the purpose of setting out Ornamental Trees on the wayssides, or within the School House grounds or other public places, thus beautifying and adding attractions to my native town.

18. "I give to the City Government in addition to the above legacy One Thousand Dollars to be invested as aforesaid in trust to be called the 'Ornamental Tree Fund,' the income only to be used in setting out trees by the way-side. . . .

20. "I give and bequeath to the Trustees or the Treasurer of the Rockport Public Library the sum of Four Thousand Dollars in trust, to be safely invested and called the 'Sawyer Fund,' the income only to be used for Books.

21. "I give and bequeath to the Parish Committee and the Treasurer of the First Parish Unitarian Society of said Gloucester, the sum of Eight Thousand Dollars in trust to be called 'Parsonage Fund,' to be safely invested, and the income be allowed to accumulate until such time, as the said officers, and the members of said Society shall deem it best, to provide a parsonage Home for their minister.

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22. "I also give to the officers of the above named Society an additional sum of Three Thousand Dollars in trust to be safely invested and called the 'Salary Fund,' the income only to be used in paying the minister's salary.

23. "I also give to said Society in trust, as aforesd One Thousand Dollars, the income only to be used in purchasing Sabbath School Books.

24. "I give to the same Committee and Treasurer of the First Parish Unitarian Society the further sum of Two Thousand Dollars, in trust, to be safely invested and called the 'Girls Industrial School Fund,' and the income only to be paid to the chief manager of said School."

These legatees, so far as appears, have the lawful power to take the money for the purposes indicated, and the purposes of the several trusts seem to be charitable.

The twenty-fifth paragraph is as follows: "I give and bequeath to my Executors and Trustees in trust, the survivors and survivor of them and their successors in the office, the sum of Eight Thousand Dollars to be safely invested as before directed, and the income only to be paid semi-annually to my nephew Capt. Charles Abram Sawyer and his heirs." This legacy should be paid absolutely to the executrix of the will of Charles Abram Sawyer, for the reasons we have hereinbefore given.

The twenty-sixth paragraph is as follows: "I also give and bequeath to my Executors and Trustees, in trust, the sum of Nine Thousand Dollars, to be invested as aforesaid, and the income only to be paid over to my two other nephews and niece, — namely, Saml. I. Sawyer, Frederic H. Sawyer and Mrs. Agnes H. Coffin, and their heirs in equal proportions, semi-annually." This legacy should be paid absolutely in equal shares to Samuel I. Sawyer, Frederic H. Sawyer, and Mrs. Agnes H. Coffin.

The forty-eighth paragraph of the will is as follows: "I give and bequeath to each of the ten following named Institutions and Societies, the sum of Four Thousand Dollars to be safely invested as a 'Permanent Fund,' and the income only thereof to be used in such manner as will from time to time best promote the interests and welfare of the said Institutions and Societies," and then follow the names of ten different societies or institutions.

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The forty-ninth paragraph of the will is as follows: "I give and bequeath to each of the Forty following named Institutions and Societies the sum of Two Thousand Dollars, to be safely invested as a 'Permanent Fund' and the income only to be used in such manner as will best promote the interest and prosperity of the said Institutions and Societies," and then follow the names of forty different societies or institutions.

The fiftieth, fifty-first, and fifty-second paragraphs of the will are as follows:

"If any of the above named Institutions and Societies, should cease to exist or should cease to perform the duties, offices and charities for which they were created, originally, I then authorize and request my Executors and Trustees to devote such legacy, or income to the use of any other kindred society, so that the same beneficent objects shall be accomplished.

"If at my decease my Stocks, Bonds, Real Estate or other property, should be depressed in value I hereby authorize and request my Executors and Trustees to defer the payment of these legacies, until such time as in their good judgment it would seem best to dispose of as much of said properties as would be required to pay these legacies in full, not exceeding five years.

"I also desire and request that the average annual income received from my property shall be considered, if less, an equitable sum to be divided and paid to the several Institutions and Societies, which shall only be paid semi-annually, say in January and July of each year, thus making the payments most convenient: — and I would further suggest that a worthy competent person, male or female, who writes a good hand, shall be employed from time to time to keep a book of accounts, showing the separate amounts received from each investment and giving also the separate amts. paid out, and to whom paid.

"In case I should in my lifetime anticipate any of the above named legacies, by gift to any one of said Institutions or Societies, my will is that such gift shall be taken and considered a payment of the legacy herein given."

We have had before us a photographic copy of the will. The paragraphs are not numbered in the will. The paragraph numbered 49 in the printed will seems to be a new paragraph; it is however in the will separated from the paragraph numbered 48

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by only slight indications. The will was written by the testator on paper which has a ruled margin on the left hand side, and it is carefully written within this margin. The first word of the first line of paragraph numbered 49 is written in the will about three eighths of an inch inside of this margin, while the other lines of this paragraph begin close up to the margin, but the space between the first line of paragraph numbered 49 and the preceding line is the same as between other lines, and the preceding line extends substantially across the page. The form of writing paragraph numbered 50 has in the written will nothing to indicate that it was intended as a separate paragraph. The preceding line extends across the page; the initial "If" of the paragraph is close to the margin, and the space between the first line of the paragraph and the preceding line is the same as the usual spaces between lines. The paragraph numbered 51 has the appearance in the written will of being intended for a new paragraph, for although between the first line of the paragraph and the line preceding is the usual space, yet the preceding line does not extend quite across the page and the "If" at the beginning of the next line is about one quarter of an inch from the margin. The second clause of paragraph numbered 51 begins about a quarter of an inch from the margin, but this is the only indication that it is a new paragraph, and there is a comma and not a period after the word "years" next preceding, but the testator often used a comma at the end of a sentence for a period. The only thing to be said from an examination of the photographic copy is that the paragraphs are not numbered, and in form are far less distinctly separated from one another than they appear to be in the printed copy. The question is whether the provisions of the paragraphs numbered from 50 to 52 relate to all legacies to or for the benefit of institutions and societies contained in the will, or only to those institutions and societies mentioned in the 48th and 49th paragraphs, or only to those mentioned in the 49th paragraph. This is a question of a good deal of difficulty, but we think that they relate to the institutions and societies mentioned in both the 48th and 49th paragraphs, and to no other.

The testator died on December 15, 1889. The will was allowed by the Probate Court of the county of Essex, by decree entered on January 20, 1890; and an appeal was taken from this decree

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and heard in this court, which resulted in the affirmance of the decree of the Probate Court on February 6, 1893. More than five years have now elapsed since the death of the testator. The words "the above named Institutions and Societies," found in the 50th paragraph, and the words "the several Institutions and Societies," found in the 51st paragraph, and the words "any one of said Institutions or Societies," found in the 52d paragraph of the will, seem to refer to the institutions and societies to which legacies were to be paid, and not to those for whose benefit property was to be held in trust by the executors and trustees. Before these paragraphs the testator had given certain property or sums of money to his executors and trustees, in trust, for the benefit of certain societies, and certain property or sums of money to certain societies, and certain sums of money to the Government of the City of Gloucester; but all these legacies either were given for special purposes set forth in the will, or the gift was to his executors and trustees with special directions. In the 48th paragraph he gives to "each of the ten following named Institutions and Societies, the sum of Four Thousand Dollars, to be safely invested as a 'Permanent Fund,' and the income only thereof to be used in such manner as will from time to time best promote the interests and welfare of the said Institutions and Societies," and the same language substantially is used at the beginning of the 49th paragraph. These legacies are to be paid directly to the institutions and societies named, and the income is to be used by them at their discretion to promote their interests and welfare or their interest and prosperity. Immediately after this he makes provision for the event of "any of the above named Institutions and Societies" ceasing to exist, and then makes a provision in a certain event for deferring "the payment of these legacies" until such time as in the judgment of his executors and trustees it would seem best to dispose of so much of his property "as would be required to pay these legacies in full, not exceeding five years," which must mean five years from the time of his decease; and then he makes provision that the "average annual income received from my property shall be considered, if less, an equitable sum to be divided and paid to the several Institutions and Societies," etc., and this we think he means shall be done until the legacies are paid in full.

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The fifty-third paragraph, which is the residuary clause, begins as follows: "After the payment of my just debts and all the legacies herein written, and after providing for the several bequests in trust, I hereby give," etc. This shows that the testator distinguished between the legacies given to his executors and trustees in trust and the legacies which were to be paid to the legatees, and that he used apt language when he intended to include all the legacies given by the will. The language of the paragraphs numbered from 50 to 52 seems to us specifically to refer to the institutions and societies named in the preceding paragraph or paragraphs which have been numbered 48 and 49.

The general rule is that legacies draw interest at the rate of six per cent per annum from one year from the death of the testator. We see nothing in the will whereby the legacies generally are taken out of the operation of this rule. The provision extending the time of payment of the legacies to certain institutions and societies, we think, was intended to affect only the convenient and most profitable management of the estate, and not the time from which interest should be reckoned. *Welch* v. *Adams*, 152 Mass. 74. *Spencer, petitioner*, 16 R. I. 25. *Wood* v. *Penoyre*, 13 Ves. 325. As we have construed this provision it requires the payment of the average annual income in place of interest to such institutions and societies.

The bequest in the 41st paragraph, in trust for the benefit of William Wynn, seems to be within Pub. Sts. c. 136, §§ 24, 25, and this bequest draws interest at the rate of six per cent per annum, simple interest, from the death of the testator.* Wynn having since died, the interest up to the time of his death is payable to his estate; the principal of this trust fund belongs to the residue of the testator's estate. The other legacies, except those contained in the 48th and 49th paragraphs, draw interest at the rate of six per cent per annum, simple interest, from one year from the death of the testator. The legacies contained in the 48th and 49th paragraphs are subject to the provisions contained in the 51st paragraph. Under these provisions interest on the amounts

* The bequest was of "the sum of Four Thousand Dollars, to be safely invested, and the income only paid over semi-annually to my Coachman William Wynn of Gloucester."

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given from one year from the death of the testator for the next four years is to be reckoned at the rate of the average annual income received from the property, if less than six per cent, and after the expiration of five years from the death of the testator at the rate of six per cent, simple interest, per annum. If any of the devises or legacies fail or lapse, they fall into the residue and pass under the residuary clause. The expenses of administration, including the expenses of the contest over the probate of the will, so far as they have been made a charge upon the estate, are to be taken from the corpus of the estate. *Bowditch* v. *Soltyk*, 99 Mass. 136. *Deane* v. *Home for Aged Colored Women*, 111 Mass. 132. *Morse* v. *Stearns*, 131 Mass. 389. *Bridge* v. *Bridge*, 146 Mass. 373.

Instructions accordingly.

TIMOTHY D. BAKER *vs.* FRED H. SEAVEY.

Suffolk. March 15, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Equitable Assignment of Mortgaged Personalty — Action for Conversion of Mortgaged Personalty by Second Mortgagee — Estoppel — Conversion — Attachment — Evidence — Value.

An equitable assignment of a mortgage does not entitle the assignee to maintain an action in his own name for the conversion of the property mortgaged.

A second mortgagee who is not in actual possession of the property covered by his mortgage, and is not entitled to the immediate possession thereof, cannot maintain an action for its conversion.

If an officer of a corporation, who is also a mortgagee of its property, in reply to inquiries concerning the financial standing of the company, falsely represents that its property is unencumbered, with intent to induce a sale of goods to it on credit, he is later estopped to set up his mortgage against the attachment of one who sold goods to the company relying on his statements, or against an officer who acted for the creditor in making the attachment.

In an action by a mortgagee against an officer for the conversion of the mortgaged property, the plaintiff must recover, if at all, upon the strength of his own title, and it is competent for the defendant to introduce evidence to show that the plaintiff had no title to a portion of the property.

In an action by a mortgagee of personal property against an officer for the conversion of the mortgaged property, which was attached by him in an action against the mortgagor, the defendant may show that certain articles claimed by the plaintiff were not attached.

The price of goods obtained at a sale by auction is competent evidence on the question of value.

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TORT, for the conversion of personal property. Writ dated March 21, 1890. Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, which, so far as material, is as follows.

The defendant, a deputy sheriff of the county of Suffolk, on January 15, 1890, attached certain furniture and fixtures in a restaurant at 737 Washington Street in Boston, as the property of the Boston Café Company, in an action brought against it by the Smith and Anthony Stove Company, and in his return on the writ stated that he had "attached certain goods and chattels as the property of the" Boston Café Company. The defendant afterwards removed the goods from the restaurant, and caused them to be sold at public auction.

At the time of the attachment of the property by the defendant, it was subject to two mortgages held by the plaintiff. The first mortgage, dated January 13, 1889, was made by one Wyman, payable to one E. A. Brown, from whom, on October 16, 1889, it was purchased for value by the plaintiff. It appeared that at the time of the purchase of the mortgage Brown delivered it to the plaintiff, together with the notes secured thereby, duly indorsed, under an oral agreement to assign it to him in writing, but that he did not so assign it to the plaintiff until July 13, 1891. The second mortgage, also given by Wyman, was payable to the plaintiff, and was dated and delivered to him on December 20, 1889. Before the attachment of the defendant the equity of redemption in the property covered by the mortgages was transferred by Wyman to the Boston Café Company.

After the plaintiff had come into possession of the mortgages, and before the attachment of the property by the defendant, it appeared that one Morandi, an agent of the Smith and Anthony Stove Company, went to the plaintiff, who was an officer of the Boston Café Company, and inquired of him the standing of that company, and whether the property in the store on Washington Street belonged to it, and whether or not such property was encumbered; that he was informed by the plaintiff that the property was unencumbered, and that the Smith and Anthony Stove Company, relying on the plaintiff's statement, afterwards sold goods to the Boston Café Company on credit.

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The defendant offered evidence to show that the plaintiff had no title to certain of the articles claimed by him, and that certain other articles claimed by him were not attached by the defendant. He also offered evidence of the prices obtained for the goods at the sale by auction, but the evidence was excluded.

The defendant made various requests for rulings, the second, third, sixth, and ninth of which were as follows:

"Second. If it shall appear upon all of the evidence that one E. A. Brown had agreed before the time of the beginning of this action to assign the first mortgage, mentioned in the plaintiff's notice to the defendant, to the plaintiff, but omitted so to do, and an assignment in writing of the said mortgage was not made until after the bringing of this action, then the plaintiff cannot maintain this action in his own name against the defendant for the value of any goods which might be covered by the said first mortgage.

"Third. If it shall appear that there was no legal assignment of the first mortgage to the plaintiff before the commencement of this action, and it shall appear that he was a *bona fide* holder of the second mortgage, then as owner and holder of the said second mortgage he cannot maintain this action of trover against the defendant."

"Sixth. A second mortgagee not in possession cannot maintain the action of trover for the conversion of the goods covered by his mortgage."

"Ninth. If the jury shall find that Morandi, acting as agent of the Smith and Anthony Stove Company, in good faith went to the plaintiff while he was an officer of the Boston Café Company and made inquiries concerning the standing of the company, and inquiries as to whether the property contained in said store at 737 Washington Street belonged to the said Boston Café Company and was encumbered, and in reply to the said question or questions of the said Morandi the plaintiff in this action informed the said Morandi that the said property contained in said store was free and clear and not encumbered by any mortgages, and that at the time the said plaintiff in this action knew that the said property was encumbered by both the mortgages under which he now claims, and if he shall have made the state-

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ments with the intent that the said Morandi, as agent of the said Smith and Anthony Stove Company, should give credit to the said Boston Café Company, and said Morandi thereafter did give credit to the Boston Café Company, relying upon the statement of the plaintiff, and the said Smith and Anthony Stove Company, by Morandi, its agent, did place certain goods in and upon the premises at 737 Washington Street, and at other places owned by the said Café Company, then the plaintiff in this action would be estopped from setting up as against the Smith and Anthony Stove Company, or its agents, the mortgages which were in existence at the time of the statement made by him that the property was free and clear, and the jury must treat said mortgages as though they were not in existence, but extinguished as far as this case is concerned, and must render a verdict for the defendant."

The judge declined to rule as requested, and instructed the jury in substance, that the plaintiff was under no obligation to state whether the property was encumbered or not, and that if he chose to misrepresent, however wrong it was, his legal rights would not be affected if he had valid and subsisting mortgages at the time.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. W. Bartlett & E. R. Anderson, for the defendant.

P. H. Cooney, for the plaintiff.

ALLEN, J. 1. The plaintiff, by reason of the equitable assignment of the first mortgage to him, acquired a right which to some extent a court of law will recognize and protect; but such an equitable assignment will not entitle him to maintain an action at law in his own name for the conversion of the property, and the jury should have been so instructed, in conformity to the defendant's second request. *Crain* v. *Paine*, 4 Cush. 483. *Norton* v. *Piscataqua Ins. Co.* 111 Mass. 532. *Rogers* v. *Union Stone Co.* 134 Mass. 31. *Moore* v. *Spiegel*, 143 Mass. 413. *Coulter* v. *Haynes*, 146 Mass. 458. Such action can only be maintained in the name of the mortgagee.

2. The plaintiff in his capacity of second mortgagee cannot maintain an action for the conversion of the property, because he was not in actual possession, and as second mortgagee was not

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entitled to the immediate possession. *Rugg* v. *Barnes*, 2 Cush. 591. *Ring* v. *Neale*, 114 Mass. 111. *Clapp* v. *Campbell*, 124 Mass. 50. The defendant's third and sixth requests presented the technical question as to the form of action which the plaintiff as second mortgagee could maintain. In substance these requested instructions were right, and a second mortgagee's ground of action should be set forth in a different form. *Forbes* v. *Parker*, 16 Pick. 462.

8. The ninth request for instructions related to the question of estoppel, and this also should have been given. It is not denied that there was evidence tending to prove the facts assumed in the request. But the plaintiff contends, as a reason for avoiding the supposed estoppel, that the creditors of the Café Company did not acquire or contemplate acquiring any title or interest in the property in consequence of his supposed representations; that they entered into no binding agreement by which they undertook to sell goods to that company on credit; and that if they should so sell goods on credit they would thereby acquire no title in the property of the company. In short, the plaintiff's argument is that the connection between the supposed representations and the loss to the creditors is not close enough. In support of this view, he cites *Bradley* v. *Fuller*, 118 Mass. 239, which was an action to recover damages for misrepresentations by reason of which the plaintiff forbore to make an attachment of property; and in which it was held that the plaintiff lost nothing which he had, and that he had sustained no legal damage. *Dudley* v. *Briggs*, 141 Mass. 582, is similar in principle. But the rule as held in those cases is not applicable to the case at bar. Here, according to the assumptions in the request for instructions, the misrepresentations were made with intent to induce the creditors to part with their property, and the creditors relying thereon did in fact part with their property, by selling it to the Café Company on credit. Under such circumstances, the objection that the connection was not close enough between the misrepresentations and the loss of property would not avail, even in defence to an indictment for obtaining goods by false pretences. *Commonwealth* v. *Davidson*, 1 Cush. 33. 2 Bish. Crim. Law, (8th ed.) § 437. Whart. Crim. Law, § 1135. But we have not to determine whether an indictment, or even

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an action, would lie against the plaintiff. The question before us is, whether, upon the assumed facts, the plaintiff is now estopped to set up his mortgages against the attaching creditors and the defendant, who as an officer acted for them in making the attachment. And we cannot doubt that he is. In *Carr* v. *London & Northwestern Railway*, L. R. 10 C. P. 307, 316, the rule as to estoppel arising from intentional acts or words is thus carefully expressed: "If a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist." This is in substance the rule which has often been recognized and acted on in this Commonwealth. *Plumer* v. *Lord*, 9 Allen, 455. *Langdon* v. *Doud*, 10 Allen, 433. *Turner* v. *Coffin*, 12 Allen, 401. *Tobey* v. *Chipman*, 13 Allen, 123. *Fall River National Bank* v. *Buffinton*, 97 Mass. 498. *Hinchley* v. *Greany*, 118 Mass. 595. *Moore* v. *Spiegel*, 143 Mass. 413. *Short* v. *Currier*, 150 Mass. 372. The assumed facts bring the present case within this rule, and the defendant was entitled to have the jury instructed in accordance with his ninth request.

4. The questions of evidence presented by the bill of exceptions, to a considerable extent, would not probably arise again in the same form. Without dealing with them in detail, it will probably be sufficient if we express our opinion upon a few general propositions involved therein.

The plaintiff must recover, if at all, upon the strength of his own title, and it was therefore competent for the defendant to introduce evidence to show that the plaintiff had no title to certain of the articles. *Rogers* v. *Cromack*, 123 Mass. 582. *Roberts* v. *Wentworth*, 5 Cush. 192. *Johnson* v. *Neale*, 6 Allen, 227. *Stanley* v. *Neale*, 98 Mass. 343.

The defendant might show that certain articles claimed by the plaintiff were not attached. His return contained no enumeration of the articles attached; but even if it had done so, it would not be conclusive against the defendant in an action brought by the present plaintiff to recover damages for the alleged taking. Taylor, Ev. § 854. *Stimson* v. *Farnham*, L. R. 7 Q. B. 175.

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Baker v. *M'Duffie*, 23 Wend. 289. *Brown* v. *Davis*, 9 N. H. 76, 82. *Boynton* v. *Willard*, 10 Pick. 166, 169, 170, *dictum*.

The price obtained at auction was competent evidence on the question of value. *Kent* v. *Whitney*, 9 Allen, 62. *Brigham* v. *Evans*, 113 Mass. 538. *Croak* v. *Owens*, 121 Mass. 28. *Clement* v. *British American Assurance Co.* 141 Mass. 298, 301.

Exceptions sustained.

FERDINANDO DI FILIPPO *vs.* S. D. ALLEN.

Suffolk. March 15, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Unreasonable Delay in Prosecution of Writ of Review.

A writ of review brought ten months after leave of court obtained to bring it is not seasonably prosecuted, and will be dismissed on motion, although, during the greater part of that period, the plaintiff in review, who had left the Commonwealth on business, was detained abroad by illness.

LATHROP, J. The defendant, on August 28, 1893, obtained judgment, in the Municipal Court of the city of Boston, against the plaintiff, in an action of contract brought by him against one Moscurdini, and the plaintiff as trustee. Subsequently the defendant brought an action of *scire facias* against the plaintiff, and obtained judgment against him on default.

On September 15, 1893, the plaintiff filed a petition for a writ of review, which, after a hearing, was granted on December 13, 1893; and the plaintiff gave a bond to prosecute the writ of review forthwith. It does not appear in the bill of exceptions when the bond was filed, nor has any copy of it been furnished us, but, as the petition asked for a supersedeas of the execution issued in the original case, we assume that this was done before the petition was granted. Pub. Sts. c. 187, § 19.

The bill of exceptions states that just prior to December 13, 1893, the plaintiff was by reason of business forced to leave this Commonwealth and go to Europe; that while in Europe he became ill, and was forced to remain in the city of Naples and

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kingdom of Italy until the month of September, 1894; and that he returned to this Commonwealth on September 27, 1894.

On October 9, 1894, the plaintiff, without any further action of the court, and without its knowledge, sued out a writ of review, which was duly served and entered in court on the first Monday of December, 1894.

The defendant thereupon appeared specially and filed in court a paper containing a plea to the jurisdiction and a motion to dismiss. The judge ordered the writ to be dismissed because of the long and unreasonable delay in the prosecution of the same. To this ruling the plaintiff excepted, and he also excepted to the refusal of the court to rule "that the writ, having once been issued, could not be dismissed, for the reason that the date of issuance was so far removed from the date of the decree of the justice who allowed the petition for review."

We are of opinion that the exceptions must be overruled. The only difference between this case and that of *Quinn* v. *Brennan*, 148 Mass. 562, is that in this case the delay was nearly ten months, while in that case it was a little over a year; and the excuses for the delay in the two cases are different. It was said in *Quinn* v. *Brennan*, that, while the statutes do not directly prescribe the time within which a writ of review must be brought, it is implied in different sections that early action must be taken. Pub. Sts. c. 187, §§ 18, 22, 29. Reference was also had to the condition of the bond, which provided that the obligor "shall forthwith prosecute a review to final judgment"; and it was said: "The court fixed no limit of time, but it was implied by the approval of the bond that the writ of review should be speedily brought. . . . No time having been fixed, it was Brennan's duty to act forthwith, or within a reasonable time. He waited too long, and the writ of review, not being within the implied terms of the leave of the court, was properly dismissed. See *Lehan* v. *Good*, 8 Cush. 302, 307; *Hobart* v. *Tilton*, 1 Greenl. 399."

We are not impressed with the excuses stated in the bill of exceptions. To say that a person is forced to leave the Commonwealth by reason of business, when he has a matter pending before the court here which will require his immediate attention if the matter is decided in his favor, is simply saying that he

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deems one matter of business more important than another. So far as appears, it was entirely practicable for the plaintiff to have given instructions to his attorney before he left this Commonwealth, or after he arrived in Europe and before his illness. We do not go into this matter at any length, because we cannot revise the finding of fact of the judge below, unless, as matter of law, it is erroneous; and we cannot say that it is.

Exceptions overruled.

J. R. Murphy, (*A. Di Filippo* with him,) for the plaintiff.

J. W. Keith, for the defendant.

CLARA M. PLACE *vs.* NATHAN WASHBURN, assignee.

Suffolk. March 19, 1895. — May 24, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Wife living Apart from her Husband — Attachment on Mesne Process — Insolvency.

An attachment by a wife who is living apart from her husband of his property, under the Pub. Sts. c. 147, § 35, is subject to the Pub. Sts. c. 157, § 46, which provides that an assignment made under § 44 of the latter statute dissolves "any attachment on mesne process made not more than four months prior to the time of the first publication" of notice of the filing of the petition, in cases of involuntary proceedings in insolvency.

LATHROP, J. The plaintiff in this bill in equity, on October 3, 1894, brought a petition, under the Pub. Sts. c. 147, § 33, in the Probate Court for the county of Plymouth, against her husband, Darius H. Place, praying for her separate maintenance, and that the real and personal estate of the respondent be attached to the amount of one thousand dollars. On October 8, 1894, in pursuance of an order of the court, an attachment was made of the real and personal estate. Such an attachment is authorized by the Pub. Sts. c. 147, § 35. On December 7, 1894, a petition in insolvency was filed by one Rider against Darius H. Place in the court of insolvency for the county of Suffolk, and that court issued an injunction against the present plain-

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tiff and the officer making the attachment, commanding them to refrain from making any transfer or disposition of any part of the debtor's property not by law exempt from attachment, and from any interference therewith until the further order of said court. On December 24, 1894, the Probate Court for the county of Plymouth made a decree on the petition filed October 3, 1894, in favor of the petitioner, ordering the respondent to pay to the petitioner the sum of three hundred dollars forthwith, and that execution issue therefor, and the further sum of twenty dollars on each month thereafter until the final order of the court. The plaintiff thereupon applied, by petition to the judge of the court of insolvency for the county of Suffolk, asking that the injunction be modified so that the same should not be taken to apply to the property attached, in order that she might levy execution upon the same. This petition was dismissed.

The prayers of this bill in equity are, that the court decree that the attachment is a valid attachment; that the attachment is not dissolved by the proceedings in insolvency or by the assignment to the defendant as assignee in insolvency of Darius H. Place; and that the defendant be restrained from interfering with the property attached, or be required from the proceeds of the property to pay the plaintiff the sums awarded her by the decree of the Probate Court for the county of Plymouth as the same are now due or may hereafter become due.

By the Pub. Sts. c. 157, § 46, the assignment made under § 44 dissolves "any attachment on mesne process made not more than four months prior to the time of the first publication" of notice of the filing of the petition, in cases of involuntary proceedings. It is admitted that, if the attachment in this case is "an attachment on mesne process," the attachment was dissolved by the assignment to the assignee.

The term "mesne process" formerly meant any intermediate process which issued, pending the suit, upon some collateral interlocutory matter; afterwards, it was used in contradistinction to final process, and this is the sense in which it is generally used in our statutes. See 3 Bl. Com. 279; *Arnold* v. *Chapman*, 13 R. I. 586; *Ferguson* v. *State*, 2 Vroom, 289, 291.

The defendant contends, however, that, as the Pub. Sts. c. 157, § 46, had its origin in the St. of 1838, c. 163, § 5, and as at the

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time that act was passed attachments could only be made by a writ, the words "attachment on mesne process" in our present law apply only to an attachment upon a writ. But this contention does not appear to us to have any weight. When the Legislature saw fit subsequently to allow attachments to be made otherwise than on a writ, it must have intended that the general provision of the insolvent law should apply to them.

Section 99 of the Pub. Sts. c. 157, allows the debtor one dollar a day for his attendance on the judge or assignee when required under § 70. It also provides that the debtor shall "be allowed out of his estate, for the necessary support of himself and his family, such sum not exceeding the rate of three dollars per week for each member of his family, and for such time not exceeding two months, as the judge may order." There is also a further provision for an allowance of five per cent on the net produce of all the estate received by the assignee, if such net produce after such allowance is sufficient to pay the creditors entitled to a dividend the amount of fifty per cent on their debts. And by the St. of 1888, c. 67, it is further provided: "In case of the absence of the debtor, or his failure for any cause to apply for the above allowances or either of them, the judge may, in his discretion, in place thereof, make allowances of the same amounts to the wife, or any minor child or children of the debtor." With these exceptions no provision is made for the debtor and his family.

It is not the policy of our law that an insolvent debtor, or his wife, or his family, shall be supported indefinitely at the expense of his creditors.

An examination of the law under which the attachment was made in this case shows also that there was no intent to give to a wife living apart from her husband any preference over his creditors. Section 35 of the Pub. Sts. c. 147, provides: "Upon such a petition, an attachment of the husband's property may be made, as in the case of a libel for divorce." Section 11 of the Pub. Sts. c. 146, provides: "Upon a libel by a wife for a divorce for a cause accruing after marriage, an attachment to secure a suitable support and maintenance to her, and to such children as may be committed to her care and custody, may be made upon the husband's real and personal estate by the officer

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serving the libel." Section 12 directs how the attachment shall be made. Section 13 is as follows: "All laws relating to attachments of real or personal estate shall apply to attachments herein provided for, so far as such laws are not inconsistent with the two preceding sections."

In actions at law or in equity an attachment is good only for thirty days after final judgment, (Pub. Sts. c. 161, § 52,) while in the case of a libel for divorce or for separate maintenance there is no final judgment which closes the proceeding as ordinary actions are ended. *Downs* v. *Flanders*, 150 Mass. 92. Hence the necessity of the use of the words last above quoted. But we are of opinion that it would be going too far to say that the wife is entitled to a suitable support and maintenance in preference to the claims of the creditors of an insolvent husband, where her attachment has not existed four months.

Bill dismissed.

W. H. H. Emmons & H. B. Emmons, for the plaintiff.

N. Washburn, pro se.

CHARLES S. WILDE *vs.* LYNN AND BOSTON RAILROAD COMPANY.

Suffolk. March 22, 1895. — May 24, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Electric Car — Due Care — Law and Fact.

If a person who enters an electric car, the seats of which are all occupied by passengers, stands upon the step of the car, without objection by the conductor, who collects a fare of him, and while the car is passing over a double curve in the tracks the motorman increases its speed, and in consequence thereof the passenger is thrown off and injured, the question of his due care is rightly submitted to the jury; and it cannot be said, as matter of law, that because he did not crowd upon the platform through and against the passengers, as there was testimony that he might have done, he is precluded from recovering.

TORT, for personal injuries occasioned to the plaintiff while a passenger upon a car of the defendant company.

At the trial in the Superior Court, before *Richardson*, J., there was evidence tending to show that at or about midnight on April

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6, 1893, Wilde took passage upon one of the defendant's electric cars at or near Cooper Street in the city of Boston; that all the seats were filled with passengers, and passengers were standing in the aisle; that the front platform was crowded, and two passengers were riding upon the steps of that platform; that the rear platform was crowded, and that there were from eight to ten passengers upon it; that upon entering the car Wilde took a position upon the step with his back leaning against the body of the car, and continued to ride in that position; that at City Square, Charlestown, where the car was stopped, Wilde alighted in order to allow a passenger named Rogers to board the car; and that, after Rogers had stepped upon the step of the car, Wilde resumed the position which he had before taken upon the step, with his back against the body of the car.

The evidence further tended to show that, after Rogers had boarded the car, the conductor requested Rogers, who had a heavy bag in his hand, to come up from the step upon the platform; that this remark was made to Rogers when Wilde was standing upon the step; and that Rogers then crowded his way up from the step upon the platform, and was standing upon the platform at the time of the accident to Wilde, his bag being hung behind over the switch stick because there was not room for it on the platform. The evidence further tended to show that the conductor took Wilde's fare when he was standing upon the step; but there was no evidence that at the time of taking his fare the conductor requested Wilde to step upon the platform.

Two of the plaintiff's witnesses testified that before Rogers got upon the platform there was room for Wilde to stand upon the platform, but that in order to do so he would have had to crowd and push his way through or against the passengers who were standing thereon.

The plaintiff's witnesses also testified that Wilde, at the time of the accident, had hold of the grab rail of the car with both hands, for the purpose of supporting himself upon the step.

The evidence further tended to show that after the car left City Square it passed along Chelsea Street at a very rapid rate of speed to a place near Henley Street, where there was a double curve in the tracks upon which the defendant operated the

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car, and that while the car was passing over the curves the motorman suddenly increased the speed of the car, and by reason thereof there was a jolting or jerking of the car which threw Wilde from the step into the street, and from which he received severe injuries. No one else was thrown from the car or injured by the jolting thereof, but several passengers testified that they were swayed violently to the right, the direction in which Wilde was thrown off, and supported themselves by holding on to the hand rails. It appeared that Wilde had been upon the step of the car about fifteen minutes before the accident.

At the conclusion of the testimony, the defendant requested the judge to rule as follows:

"1. Upon the whole evidence, the plaintiff is not entitled to recover. 2. If the jury find that after the plaintiff took his position upon the step of the car there was room for the plaintiff to get up off the step of the car and ride upon the platform thereof, or inside the car, he was careless in remaining upon the step of the said car, and cannot recover. 3. If the plaintiff voluntarily remained upon the step of the car when there was room enough for him to ride in safety upon the platform thereof, he was guilty of negligence, and the verdict should be for the defendant."

The judge declined so to rule, and instructed the jury substantially, there being no question raised as to the negligence of the defendant, that it was for them to consider whether, under all the circumstances of the case, the plaintiff was in the exercise of due care in standing upon the step of the car, and, if so, whether he exercised due care in protecting himself from falling off.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. I. Badger, for the defendant.

S. J. Elder, (*W. C. Wait* with him,) for the plaintiff.

LATHROP, J. The defendant's counsel admitted at the argument that the plaintiff was an adult, and that there was evidence of negligence on the part of the defendant. The only question then is whether the court below ought to have ruled, as matter of law, as requested by the defendant, instead of submitting the question of the plaintiff's due care to the jury. We are of opinion that this question was properly submitted to the jury.

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The defendant in effect concedes that the course pursued by the court below would have been correct if the plaintiff had been riding upon a horse car instead of upon an electric car. *Meesel* v. *Lynn & Boston Railroad*, 8 Allen, 234. *Wilton* v. *Middlesex Railroad*, 107 Mass. 108. *Maguire* v. *Middlesex Railroad*, 115 Mass. 239. *Fleck* v. *Union Railway*, 134 Mass. 480. *Lapointe* v. *Middlesex Railroad*, 144 Mass. 18. *Germantown Passenger Railway* v. *Walling*, 97 Penn. St. 55.

It is contended, however, that as electric cars run at so much higher a rate of speed than horse cars, and as it is much more dangerous to ride upon the platforms or steps of the latter class than upon those of the former class, a different rule of law should be applied. It is, however, to be remembered that the defendant allowed the car to be very crowded, and that the plaintiff rode where he did without any objection on the part of those having charge of the car. Being received as a passenger riding as he did, we cannot say, as matter of law, that, because he did not crowd upon the platform, he was precluded from recovering. *Pray* v. *Omaha Street Railway*, 44 Neb. 167.

Exceptions overruled.

MARY L. RYDER, administratrix, *vs.* EDWARD J. JENKINS.

Suffolk. March 27, 1895. — May 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Petition to prove Exceptions — Reduction of Exceptions to Writing in a Summary Mode.

A petition to establish the truth of exceptions should contain an exact copy of the bill of exceptions which was filed.

A bill of exceptions which, though conformable to the truth, set forth at great length a report of the testimony taken at the trial, and disclosed no attempt to reduce the exceptions to writing in a summary mode, as required by Pub. Sts. c. 153, § 8, was for that reason properly disallowed by the presiding judge.

PETITION to establish the truth of exceptions alleged by the defendant, and disallowed by *Blodgett*, J., who presided at the trial in the Superior Court. The facts appear in the opinion.

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The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

E. H. Savary, for the respondent.

P. J. Casey, for the petitioner.

FIELD, C. J. This petition is irregular, in that it does not purport to set out an exact copy of the exceptions filed in the Superior Court. It sets out a copy of the testimony, with a copy of the indorsement of the presiding judge on the exceptions. An examination of the original exceptions shows that they contained a short statement of the nature of the action, and of the defence made by the petitioner. If the petition is allowed and the truth of the exceptions established, the nature of the action and of the issues tried may perhaps be supplied by the copies of the writ and pleadings which are usually furnished to the court, but a petition to prove exceptions should contain an exact copy of the exceptions which have been filed. The action was for money had and received by the defendant to the use of the plaintiff, as administratrix of the estate of George Ryder, deceased. The answer of the defendant admitted the receipt of the money except one item of the amount of $41.75, and alleged that the defendant was the attorney of the plaintiff as said administratrix, and received the money, except said item of $41.75, as such attorney, and paid it out by direction of the plaintiff to the creditors of the estate and to other persons entitled thereto. The plaintiff denied that the defendant was employed by her as her attorney, or was authorized by her to pay the money to any person. The case was submitted to the jury who returned a verdict for the plaintiff for the whole amount of her claim. The exception taken is to the refusal of the presiding justice to rule that on the whole evidence the plaintiff had failed to make out a case. The certificate signed by the justice presiding at the trial is as follows: "The statements contained in said bill of exceptions are conformable to the truth, but as I am of the opinion that it is wholly unnecessary to make a full report of all the evidence in the case by question and answer a part of the defendant's exceptions, I disallow this bill of exceptions for the reason that the defendant has not 'reduced his exceptions to writing in a summary mode,' as required by section 8, chapter 153, of the Public Statutes." The full report of the evidence referred to is

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the stenographic report of the whole testimony taken at the trial. There are eighty-two pages of it. An examination of it shows that a considerable part of it consists of merely preliminary examinations of the witnesses in regard to their names, their relations to the parties and to the cause, and their probable prejudices, and of objections by counsel, and of colloquies between counsel or between court and counsel, which resulted in no ruling by the court. It is obvious that, if this method of reducing exceptions to writing is to be sanctioned, a good deal of unnecessary expense will be put upon the parties, and unnecessary labor will be put upon the court. The labor of selecting the really material parts of the evidence from such a mass is a considerable burden. It is true that, when the exceptions are to a refusal by the court on the whole evidence to direct a verdict as matter of law, the excepting party, as he cannot as of right amend the exceptions filed, but possibly may be compelled by the presiding justice to abide by his exceptions as filed, naturally may feel that he runs some risk in attempting to abridge the evidence. Still, we have no reason to believe that the power of the presiding justice to permit amendments to exceptions by the excepting party is not liberally exercised in all cases where it appears that there has been an attempt in good faith to state all the material evidence. It is almost inevitable in any trial that a good many things occur which are ultimately found to have no material bearing on any question of law raised at the trial, and such evidence as is material usually can be stated in the narrative form. We are of opinion that the present case on its face discloses no attempt to "reduce the exceptions to writing in a summary mode"; that it shows an abuse in procedure which ought not to be sanctioned, and which the statutes were not intended to permit; and that the presiding justice rightly refused to allow the exceptions in their existing form.

Whether the excepting party can or should now be permitted to amend his exceptions by striking out what is immaterial is a question not before us. It might be worth while for the petitioner to consider whether, on the issue presented, the burden of proof was not on him except as to one item. The present petition must be dismissed. *Churchill* v. *Palmer*, 115 Mass. 310. *Curry* v. *Porter*, 125 Mass. 94. *Petition dismissed.*

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COMMONWEALTH *vs.* JOHN A. CONNELLY.
SAME *vs.* SAME.

Bristol. April 1, 1895. — May 24, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Falsely Making and Filing a Nomination Paper — Complaint.

The offences of falsely making a nomination paper, and of filing the same knowing it to be falsely made, under the St. of 1893, c. 417, § 321, may be charged in the language of the statute without alleging either a fraudulent intent, the manner or means by which the paper was falsely made, or the details in respect to which it was so made.

The signing by a third person of the name of a voter to a nomination paper, not in his presence and at his request, and the subsequent filing of such a paper, constitute the offences of falsely making a nomination paper and of filing a falsely made nomination paper, within the St. of 1893, c. 417, §§ 78, 321, irrespective of the intent with which the acts were done.

TWO COMPLAINTS, under the St. of 1893, c. 417, § 321, the first of which was for falsely making, and the second for filing, knowing the same to be falsely made, a nomination paper.

The first count of the first complaint alleged that the defendant, on November 24, 1893, "unlawfully did falsely make a certain nomination paper for the nomination of a candidate" for alderman of the city of Fall River. The second count of the first complaint alleged that the defendant "unlawfully, knowingly, and designedly did falsely make a certain nomination paper, . . . which said nomination paper said John A. Connelly did then and there . . . falsely make, and did then and there falsely and unlawfully sign by writing and signing on said nomination paper the name Colgan Edward, . . . all of which names John A. Connelly aforesaid then and there at the time and place aforesaid did on and to the nomination paper aforesaid falsely and unlawfully sign."

The first count of the second complaint alleged that the defendant, on November 24, 1893, "did file . . . a certain nomination paper, . . . which nomination paper aforesaid was falsely made, he the said John A. Connelly aforesaid then and there, . . . when he . . . so filed the nomination paper aforesaid, knowing said nomination paper to be falsely made."

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The second count differed from the first only in alleging the filing of a "falsely made nomination paper." Each complaint contained an averment that both counts therein were different descriptions of the same acts.

The defendant seasonably filed motions to quash the complaints, assigning as reasons therefor applicable to the first complaint, 1. that it did not appear that the defendant had any fraudulent intent in making the nomination paper; 2. that it was not averred in what manner or by what means the defendant falsely made the nomination paper; and, as applicable to the second complaint, 1. that it averred no fraudulent intent in filing the nomination paper, and 2. that it did not aver in what respect such paper was falsely made.

The defendant also filed a plea to the jurisdiction, in which he alleged that the St. of 1893, c. 417, was unconstitutional, in that the provisions requiring voters signing nomination papers to sign the same in person, and to add thereto their places of residence with street and number, if any, gave to a certain class of citizens political powers and privileges which were denied to another class of citizens, to wit, those who are physically disabled so that they cannot read or write, and those who were citizens prior to the adoption of the twentieth article of Amendment of the Constitution of the Commonwealth, and who cannot write.

The motions to quash and the plea to the jurisdiction were overruled; and the defendant excepted.

At the trial in the Superior Court, before *Maynard*, J., the case was submitted to the jury upon an agreed statement of facts, in substance as follows.

Of the signatures on the nomination paper all but six were signed in person by the voters to whom the names belonged, and of the six signatures which were made by the defendant four were made by him at the request of the persons bearing those names, and two of them before the defendant had requested the persons having those names to sign the paper. Before filing the nomination paper, however, the defendant notified the last two persons that he had signed their names, stating the character of the nomination paper and the purpose in signing their names, and received from them their assent and authority for so doing. The defendant had no intention to mislead, deceive, cheat, or

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perpetrate any fraud by signing such names, but believed that it was lawful for him so to do, and he filed the nomination paper not knowing that it was falsely made other than that he had signed the names as stated above, believing that he was authorized so to do, and believed that it was lawful and proper for him to file the paper.

The defendant requested the judge to instruct the jury that upon the agreed statement of facts the defendant was entitled to an acquittal; but the judge declined so to do, and instructed the jury to return a verdict of guilty, which was done accordingly; and the defendant alleged exceptions.

J. W. Cummings, for the defendant.

A. J. Jennings, District Attorney, for the Commonwealth.

LATHROP, J. These are two complaints, each in two counts, under the St. of 1893, c. 417, § 321, the first for falsely making, and the second for filing, knowing the same to be falsely made, a nomination paper. The material parts of § 321 are as follows: "Whoever falsely makes . . . any certificate of nomination or nomination paper, or any part thereof, . . . or files any certificate of nomination or nomination paper, . . . knowing the same or any part thereof to be falsely made, . . . shall be punished," etc.

Motions were made to quash the complaints because no fraudulent intent was alleged either in the making or the filing of the paper, and because the manner or means in which the paper was falsely made was not alleged.

We are of opinion that the motions to quash the complaints were rightly overruled. The offences charged of making and of filing respectively are purely statutory offences, and it was enough to charge them in the language of the statute.

In *Tully* v. *Commonwealth*, 4 Met. 357, it was said by Chief Justice Shaw: "When the statute punishes an offence, by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offence named, at common law. . . . But we think this is not necessary, when the statute describes the whole offence, and the indictment charges the crime in the words of the statute." See also *Commonwealth* v. *Harris*, 13 Allen, 534, 539; *Commonwealth* v. *Barrett*, 108 Mass. 302.

We have no occasion to consider whether the first count of the

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first complaint sufficiently sets forth in what manner or by what means the defendant falsely made said nomination papers, for the manner and means are fully set forth in the second count. The counts are for the same offence, and the motion to quash is to the whole complaint, and not to any particular count thereof.

The gist of the offence in the second complaint is that the defendant filed the nomination paper knowing the same to be falsely made.

As to the first ground assigned in the motion to quash, the authorities above cited show that it was sufficient to set out the offence in the words of the statute.

The second complaint does not set out, in either count, in detail, in what respect the nomination paper was falsely made. But the offence charged is purely a statutory offence, and it was enough to charge it in the words of the statute. *Tully* v. *Commonwealth*, *ubi supra*. *Commonwealth* v. *Ferry*, 146 Mass. 203, 208.

The remaining question is whether the judge erred in refusing to instruct the jury in each case to return a verdict of not guilty. Section 78 of the St. of 1893, c. 417, provides: "Every voter signing a nomination paper shall sign the same in person, and shall add to his signature his place of residence, with the street and number thereof, if any." The question is what is meant by the words "shall sign the same in person." The natural meaning of the statute is that a voter shall, with his own hand, write his name and address. If anything less than this is permitted, the signing must be done at the request of the voter and in his presence. Previous authority or subsequent ratification is not enough. To hold otherwise would be to give no effect to the words "in person." There is nothing in the agreed facts to show that any one of the six names written by the defendant was written in the presence of the voter to whom it belonged.

No fraudulent intent is necessary to constitute the offence. It is immaterial that the defendant did not intend to break the law. It is enough that he did the things made offences by the statute. *Commonwealth* v. *Farren*, 9 Allen, 489. *Commonwealth* v. *Goodman*, 97 Mass. 117. *Commonwealth* v. *Raymond*, 97 Mass. 567. *Commonwealth* v. *Emmons*, 98 Mass. 6. *Commonwealth* v. *Wentworth*, 118 Mass. 441. *Commonwealth* v. *Shea*,

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150 Mass. 314, 315. *Commonwealth* v. *Gray*, 150 Mass. 327. *Commonwealth* v. *Warren*, 160 Mass. 533.

When, therefore, the defendant signed the names of the six voters to the nomination paper he falsely made such paper, and when he filed such paper he filed a falsely made nomination paper, however innocent his intention may have been.

It is contended, however, that, as it is admitted that the defendant did not know that the paper was falsely made other than that he signed the names as before stated, believing that he was authorized so to do, and that it was lawful and proper for him to file the paper, the jury would not be warranted in convicting him of the offence set forth in the second complaint.

It was undoubtedly incumbent upon the government to prove that when the defendant filed the paper he knew that it was falsely made. But this is not the case of one person making the paper and another person filing it. The defendant himself made the paper and filed it. The statute points out how the paper is to be made, namely, that it is to be signed by the voters "in person." He is presumed to know what the statute requires, and what the statute means. When the government had shown the facts, the presumptions of law warranted a conviction.

The case of *Commonwealth* v. *Bradford*, 9 Met. 268, relied upon by the defendant, was an indictment under the Rev. Sts. c. 4, § 6, which provided that, "if any person, knowing himself not to be a qualified voter, shall, at any election, wilfully give in a vote, for any officers to be then chosen, he shall forfeit" a certain sum. The word "wilfully" was held to mean "designedly, purposely, with an intent to claim and exercise the right of suffrage." The main issue in the case was whether the defendant had had a domicil in Boston for six months before the election. At the trial in the court below the jury had been instructed that the fact that the defendant had consulted counsel with reference to his right to vote, and had received an affirmative answer, could not be regarded as negativing a knowledge on his part of his want of the legal qualification to vote. It was said by Chief Justice Shaw, with reference to this aspect of the case: "In order to convict a party, under this statute, which is extremely liberal in this respect, it is necessary to prove, not only that the party had no right to vote, but that he knew it. As this qualification

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depends upon domicil, and that is often a complicated question of law and fact, we have no doubt, that if the voter, in good faith, and with an honest purpose to ascertain the right, shall make a true statement of the facts of his case to a professional man, or any other man of skill and experience, capable of advising him correctly, the evidence of such advice, and the facts upon which it was taken, are competent, as bearing upon the question whether he knew that he had not a right to vote."

In the case at bar no complicated question of law and fact was presented; nor did any question of the effect of consulting counsel arise.

The defendant does not object to the fact that the court below directed a verdict of guilty in each case, if there was no evidence from which the jury would be warranted in acquitting him. Nor does his counsel press the plea to the jurisdiction which was filed in the court below. The order therefore must be,

Exceptions overruled.

DANIEL CARVILLE *vs.* INHABITANTS OF WESTFORD.
MARTHA CARVILLE *vs.* SAME.

Middlesex. March 12, 1895. — May 25, 1895.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Personal Injuries — Defective Highway — Want of Barrier or Railing — Due Care — Negligence — Evidence — Witness.

Evidence that a witness of the adverse party had made statements out of court inconsistent with his testimony is admissible without first calling the attention of such witness, when testifying, to the time, place, or circumstances of the alleged contradictory statements.

A town may be found to be liable for damages where a heavily loaded four-horse wagon is thrown into the gutter by the passing of the rear wheel over a stone on the surface of a narrow rounded and icy roadway at a point not far from a culvert through which a brook crosses the roadway, and where, in the attempt to get the wagon again upon the usual path without unloading it, it is overturned and carried into the brook.

A jury may find that a rounded roadway only eleven feet wide and covered at least in part with smooth hard ice, and with a steep slope at the side into a gutter encumbered with snow, where the roadway is crossed by a brook, and with

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no railing by the side of the roadway or upon the culvert, is a defective way, even in a sparsely settled locality, and at the season when sleighing has just ended and travel is upon wheels.

TWO ACTIONS OF TORT, for personal injuries, and for damages to property, sustained by the plaintiffs by reason of a defective highway in the defendant town.

Trial in the Superior Court, before *Bishop*, J., who allowed a bill of exceptions in substance as follows.

The way upon which the accident occurred was in a thinly settled part of the town, but it was one which the town was bound to maintain and keep in repair. It extended east and west, and was principally used as a means of communication between three houses abutting on it and a quarry at the easterly end thereof. Near the place of the accident it crossed a brook by means of a culvert covered with flat stones and gravel, and at the northerly side of the culvert was a driveway leading through the brook, which at the time of the accident was not in condition for use. The plaintiff Daniel Carville testified that he was a teamster, and that at the time of the accident, on March 18, 1891, he was engaged in hauling stone from the quarry, using for this purpose a "stone wagon," ten or eleven feet long, and about six feet wide from wheel to wheel, and four horses, one of which was owned by Martha Carville, the other plaintiff; that he had already passed over the road four times on the day of the accident, and six times on the day before; that in the afternoon of March 18, while making his fifth trip, travelling westerly, and when he was within a few feet of the culvert, his "hind wheel struck a little cobble," and glanced off the road, going down about a foot or a foot and a half out of the road-bed; that he then stopped his horses, took off his leaders, hitched them to the rear of his wagon and tried to start his load back, but could not do so; that he then replaced his lead horses in front of the load, as before, reined them across the road to the left and attempted to start, but that the leaders would not pull; that one Porter, who was hauling wood, then came up, and his horses having been substituted for the plaintiff's lead horses, the plaintiff Daniel Carville again reined the horses across the road, started the load about a foot or a foot and a half, and stopped to see how the wagon was coming;

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that it seemed to be coming into the road all right, and so he started again; and that the load moved forward about a foot, and then tipped over into the brook, drawing the pole or wheel horses in with it. The plaintiff further testified that the road-bed at the place of the accident was eleven or twelve feet wide, and rounded, having ice in the centre and snow along the edges; that the water in the brook was almost up to the top of the bridge; that on each side of the road-bed there was a sharp slope, which on the northerly side of the road was four or five feet in depth; and that there was no rail or barrier to prevent teams from going over the embankment, and that cobble stones were scattered in the road all the way down from the quarry.

On cross-examination he testified that there were no ruts in the ice on the road and bridge made by wagon wheels, but that there were white marks in the ice about a quarter of an inch in depth made by loaded teams passing over it, in which the plaintiff's team travelled until the wheel struck a stone and glanced off; that the plaintiff saw the stone in the rut ahead of him; that the wheel was thrown about a foot or a foot and a half out of the track at a distance of about eighteen or twenty feet, and not sixty feet, from the culvert; that after the wagon left the rut he started it twice before it went over, and the first time it moved about a foot, and the second time about six inches; that from the time it left the rut until it tipped over, it did not go more than eighteen inches; that it was but a short distance back to the quarry where he could have obtained implements with which to have cut a rut or track through which the wheel could have been drawn back into the road; that the lead horses might have slipped a little, although they had been sharpened a week or two weeks before, and the pole horses had been sharpened two or three days before by Woodward, a blacksmith, but that the danger was caused by the ice upon the road, and that he had not said that he would go into the brook or into the road.

One Henry A. Fletcher testified, for the plaintiff, that at the time of the accident the road was covered with ice and had snow for a hundred feet on either side of the bridge; that there was a slope from each side of the road-bed extending from sixty to seventy feet in either direction from the brook,

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varying in depth, but being about four feet deep at the bridge; that at the time of the accident the culvert was very nearly filled with water, and that there was so much snow on each side of the road as to prevent any one from observing the abruptness of the slope of the bank. He further testified that an average of about thirty teams passed daily over the road.

One Wilson also testified, for the plaintiffs, that he was with the plaintiff Daniel Carville at the time of the accident, walking behind his team; that the horses seemed to walk along all right until they came close to the bridge, when the witness saw the wagon jump off the road, which was steep down on each side; that the witness and Daniel Carville started the horses, and did everything they could; that they got some other horses and put them on ahead, and pulled the team one way and another, and tried to pull it back with another team hitched to the rear end, until finally the plaintiff's wagon settled and went over; that the wheel went off the road ten to fifteen feet back from the bridge, at which time the lead horses were across the bridge and the pole horses were on it; that he heard no one suggest to Carville that if he did not look out he would get into the brook; and that Carville did not say that he would get the wagon out or get into the brook.

One Hill, also called as a witness by the plaintiffs, testified that he went over the road on the day after the accident; that the road was rounding, filled with ice in the middle, and went right off sloping; that there was snow on each side; and that there was nothing to prevent the wheels of the wagon from going off.

One Herbert E. Fletcher, also called as a witness for the plaintiffs, and who lived on the road, testified that just prior to the accident the road was narrow and icy.

The defendant called as a witness one Smith, an engineer, who testified, from measurements made by him, that the travelled part of the road-bed at the culvert, and for a distance of about fifty or sixty feet easterly thereof, was eleven feet wide between the points where it began to fall off; that it was twelve to thirteen feet between the banks or slopes, the culvert was sixteen feet long, and the road at the culvert eleven feet wide; that at a point twenty-one feet from the culvert the road slope, on the

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side where the accident occurred, was of 3.6 base and 2.6 fall, and at a point about fifty feet from the culvert the slope was 4.8 base and two feet fall, and continued to grow less until there was practically no slope at a distance of about sixty feet from the culvert; that the plaintiff's load of stone at the side of the road was about eighteen feet easterly of the culvert, and that there were stone or granite chips about sixty-five feet therefrom in the same direction, lying in the road, and about on a level with its surface; and that the road was very nearly level for a distance of one hundred feet east of the culvert.

Joseph H. Sears, also called as a witness for the defendant, testified that he saw the plaintiff's wagon when it tipped over; that he saw where the wheels left the rut, which was at the stone chips about sixty or sixty-five feet east from the culvert; that he saw the track on the ice made by the wagon wheel after it left the rut, and that it ran along near the bottom of the slope for a distance of forty to forty-five feet, to the point where it tipped over; that the ruts were from one to two inches in depth, and passed along about the centre of the road for one hundred feet or more easterly of the culvert; and that from the culvert to the stone chips it was from two and a half to three feet between the ruts on either side and the edge of the slope, and that the ice was even and level over the road. He further testified that he heard Porter tell the plaintiff Daniel Carville that if he attempted to go forward he would go into the brook, to which Carville, who appeared a little excited, replied with an oath that he would pull the load out or go into the brook; that it was two to three feet from the right hand rut to the edge of the slope at the point where the wagon tipped over; and that when he first saw the wagon the right wheel was from four to five feet outside the right hand rut, and about three feet down the slope.

John H. Porter, also called as a witness by the defendant, testified that he was present at the time of the accident; that there were ruts in the ice, but otherwise the ice was level and even over the travelled part; that it was from two and a half to three feet from the ruts to the edge of the slope on either side of the road as far back as to the stone chips, including the place where the wagon tipped over; that the right wheel of the wagon was four to five feet outside of the right hand rut, and about

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three feet down the slope. He further testified that the plaintiff Daniel Carville's wagon was so far off that the witness did not think it could be brought up, and told Carville that it was dangerous to attempt it, to which Carville, with an oath, replied, "I 'll go into the brook, or pull out"; that the plaintiffs' horses slipped; that the witness suggested to Carville to unload the stone or to get another wagon, and to put the stone into it; and that he told Carville to take his leaders off and that the witness would put his own horses on, which he did, whereupon they started the wagon and stopped and put on another horse ahead of the witness's, and let the three horses out with a chain its full length some ten feet from the end of the pole; and that Carville unhitched the pole so that, if it went over, it would not pull the witness's horses into the brook.

One Edwards, also called as a witness by the defendant, testified that he teamed over the road the day before and the day after the accident, drawing with two horses one and a half to two tons, and had no difficulty in passing over the road; that the wheel ruts were one and a half to two inches deep, and kept the wheels all right; and that, except in the wheel ruts, the ice was level and even in the road-bed. He also described the location of the ruts, the width of the margin, and the track made by the plaintiffs' wagon wheel after it left the rut, in substantially the same manner as was done by Sears and Porter.

Henry Chamberlain, the road commissioner, also testified for the defendant that, with the selectmen, he went to the place of the accident on March 21; that there were wheel ruts in the ice, and that the marks made by the plaintiffs' wagon wheel on the side of the road-bed were plain to be seen; that he followed them from where the wheel left the rut to where the wagon tipped over; that by measurement it was sixty-five feet from where the wheel left the rut to the culvert; and that the ice in the road-bed was level and even.

One Haywood testified, for the defendant, that he saw the marks of the plaintiffs' wagon wheel on the ice at the side of the road; and that the surface of the road-bed was level, and covered with smooth ice into which wheels had cut on the travelled part of the road, making ruts which teams followed. Both he and one S. H. Fletcher testified that the distance from where the wheel left the rut to the culvert was about four rods.

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The last three witnesses testified to the same facts as Sears and Porter did, as to the ice and ruts in the highway, the location of the ruts, and the width of the margin of the road outside the ruts, and the length and location of the track made by the plaintiff Daniel Carville's wagon wheel. They also testified that they had passed over the road at the place of the accident several times, and had never observed anything dangerous or defective about it.

One Woodward, a blacksmith, testified that he shod no horses for Carville in January, February, or March of 1891, and John N. Carter and Peter Corr, witnesses for the defendant, testified that they had a conversation with the plaintiff Daniel Carville in September, 1892, in which he told them that neither his horses, wagon, nor harness were injured in the accident; that he caught a little cold himself, and did not work for a few days; that he could have worked, but as the town of Westford was good for it, he proposed to make it pay.

The plaintiff Daniel Carville testified in rebuttal, and denied having made the statements alleged by Carter and Corr. He was asked by his counsel whether he had had a talk with the witness Porter, in which the latter had said anything about what he was alleged to have said to the plaintiff Daniel Carville about going into the brook, or about it being dangerous to attempt to go forward, as testified to by Porter. To this question the defendant objected, on the ground that it called for evidence tending to impeach the testimony given by Porter by showing that he had made statements out of court inconsistent therewith, and that a proper foundation for such testimony had not been laid by calling the attention of Porter, when testifying, to the time, place, and subject matter of the statements alleged to have been made by him. The judge overruled the objection, and admitted the testimony, subject to the exception of the defendant. The plaintiff Daniel Carville then stated that on a previous day, in the court-room and in the presence of his counsel, Porter told him that nothing had been said by him, Porter, at the time of the accident to the witness, about it being dangerous to start forward, or by Carville about going in or out of the brook, as testified by Porter and Sears at the trial.

Porter, being recalled by the defendant in rebuttal, denied having told Carville that nothing was said by him at the time of

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the accident about it being dangerous to start forward, or by Carville about going into the brook or out of it.

At the close of the evidence, the defendant requested the judge to rule that the evidence did not warrant a verdict for the plaintiffs; but the judge declined so to rule, and the defendant excepted.

The defendant then requested the judge to instruct the jury as follows:

"1. If the plaintiff saw ice and snow in the road before he reached it, and knew, or had reasonable cause to believe, that the road was thereby rendered dangerous to travellers thereon, and he voluntarily proceeded to pass over the same, he took upon himself the risk, and if he sustained actual damage by reason thereof, he cannot recover.

"2. If the plaintiff was in such a position that it was his duty to do something which, if done in a particular way, would be dangerous, but if done in another way would not, he is bound to adopt the latter course. If his choice is open to him, and he voluntarily exposes himself to danger, he cannot recover.

"3. Whenever a railing is required by the side of a way, it is such a railing as is suitable for the ordinary exigencies of travel upon such a road at such a place; and the defendant town is not liable for the want of a railing, even if one was required, if the same would not have prevented the happening of the injury complained of."

The judge declined to give the rulings requested, except so far as they were covered by the instructions to the jury, which were in substance as follows.

There is no liability for injuries received from defects in the condition of the highway except under the provisions of the statute. This liability rests upon the principle of law that whoever suffers in his person or property by reason of a defect upon a way which a town or city is bound to maintain, which might have been remedied, or the dangers arising from which might have been prevented, by the exercise of due care on the part of the city or town, shall have a right to recover for the same, provided the city or town had reasonable notice of the defect, or by the exercise of due diligence might have had such notice; provided that the person making the claim was himself in the exer-

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cise of due care at the time; that whenever a person seeks in an action to recover from a town for injuries sustained by reason of a defect in a way, he must show affirmatively, first, that he was in the exercise of due care, and, secondly, that the town was not in the exercise of due care, or, as in this case, that there was a defect which arose from the lack of the exercise of due care; and that if the circumstances in regard to care on the part of the plaintiff are equally consistent with care and negligence, then he fails to show that he was in the exercise of due care, and cannot recover; that mere slipperiness or a merely icy condition of a place caused by the elements upon a surface which was otherwise proper was not a defect; that while the principle of what constitutes a defect is the same in a city or town that is wealthy or poor, in a city or populous town or in the remote extremity of a sparsely settled town the application is different; in either case the city or town is bound to do all that can reasonably be required of it, and nothing more; that where there is constant and frequent passage in the streets the application of this principle will require a much greater exertion of force and power, and a much larger expenditure of money, than in a country road where there is little travel, and where neither the resources of the town nor the exigencies of the place itself in the road determine that it is reasonable that the town should do as much as in the more thickly populated and frequently travelled place; that the contention of the plaintiff was that the road was narrower at the place of the accident than it should have been, which narrowness, taken in connection with the want of a barrier and the icy condition of the place, constituted a defect against which the town was bound to guard; that, on the other hand, the defendant contended that the road, not being much frequented, and being in a remote part of the town, was suitable and proper for that place; that in determining whether the way was defective the condition and location of that way in particular, and no other, was to be considered, and it was for the jury to say whether it was in such a condition as the defendant, having regard to all the circumstances of the case, was bound to have remedied by the substitution of a better road.

The next question is whether the plaintiff was in the exercise of due care. In order to determine this question, it is necessary

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to ascertain what the facts are, because there is a serious conflict of testimony as to how the accident occurred. There is opposing testimony here which is entitled to careful consideration. Carville says: "I came down to the bridge there and my hind wheel struck a little cobble and it glanced, and the wheel slipped down about a foot or a foot and a half off the road. I stopped the team and pulled my horses across the road. My lead horses would not take hold and pull the second time; Mr. Porter came along and put his horses on, and then an attempt to pull across was made and the accident occurred." That is, Carville says he came down in the place where the wheels ordinarily went until he came to this little stone; that the hind wheel struck it, the wagon glanced off, and that was the cause of the wagon getting off from its right position in the road. He says the road was about eleven feet from shoulder to shoulder, and, in regard to that, there is no great difference of testimony between him and Smith, the engineer on the other side. Carville gives the slope according to his judgment, and the engineer gives it according to measurement. Carville says there were no ruts in the ice where the teams had travelled over it; that there might have been white marks on it where teams went over it, a quarter of an inch in depth, but no ruts of any considerable depth; that the wagon wheel struck the stone and glanced out into the snow, and that, before that, the wheels had been in the ruts; that they were thrown out from a foot to a foot and a half; that it is not true that the wagon wheel went out of the rut sixty feet back from the bridge, he is sure of that; that he remembered the little stone and saw it just ahead of him; that it threw the wagon wheel out a foot or more; and that he stopped right there. He denies that he was told by Porter that the team would go into the brook, or that he, Carville, said that he would go into the brook or out of it, or that the pole was unhitched or the chain lengthened for Porter's horses. His contention is that coming up in the regular place for wheels, not in deep ruts because he denies that there were any, but along where the wheel marks went regularly, — coming up there until he got to this stone he struck the stone, and that striking the stone caused the wheel to glance off, carrying the wagon off, and was the cause of the wagon being off the regular place; and he denies that he

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was informed or notified by anybody that the wagon was likely to go into the brook, or that he said that he would bring it out or else into the brook.

The defendant's contention is that the wheels went off from the regular wheel tracks, regular places in the road where the wheels ordinarily went and should have gone, from sixty to sixty-five feet before reaching the bridge, and kept going off until they got down to the place where the bank was deeper, and that the wheel kept going along on the bank, which became deeper and deeper, until the wagon got thirty or forty feet away from the place where the wheels first went off from the marks or ruts in the road; that then the off wheel had got something like four or five feet over from the wheel rut, and two or three feet over from the shoulder of the slope, when Carville stopped; that then he was trying to bring his load up by his own lead horses, who would not pull; and that Porter came along and assisted him; that Porter distinctly told him that he would have his team in the brook if he attempted to get it up in that way, to which Carville replied that he would have it into the brook or out of it. Further, the defendant contends that Carville was negligent, having passed over the road several times and being familiar with it, in attempting to go over the road at all, especially with horses which, as the defendant says, were not sharp-shod.

If there was a defect in the road there which the town of Westford was bound to guard against, and Carville used due care, all that a reasonable man could be asked to do, he may recover, but he cannot recover if there was no defect there, nor can he recover whether there was a defect there or not if at the time of the accident and before it he was guilty of negligence and was not in the exercise of due care. Upon all the evidence in this case, and upon the principles which ought to govern in considering the evidence, it was for the jury to say, first, whether there was a defect there, that is, whether there was such a condition of things in that road at that place as, having a due regard for its duties, and also due regard to its power and resources, the town of Westford was bound to have made it better and more secure for travel for those who should pass over it; and if that is so, then, secondly, whether the plaintiff Daniel Carville has shown to you that he was in the exercise of due

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care upon this occasion. Due care means the same sort of care which any man of reasonable prudence under the same or like circumstances would have exercised; and the jury, considering themselves as persons of ordinary prudence and caution, might well ask themselves what would any one of them have done under the same circumstances.

The judge then put to the jury three questions, to be answered in writing: "1. Was there a defect or want of repair, or of a sufficient railing, at the place in question, which might have been remedied, or the damage from which might have been prevented, by the exercise of reasonable care and diligence on the part of the town? 2. If so, did the town have reasonable notice of such defect, or might the town by the exercise of proper care and diligence have had notice of it? 3. Was the plaintiff Daniel Carville in the exercise of due care in what he did at and immediately before the time of the accident?"

The jury answered each of these questions in the affirmative, and returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

J. C. Burke, for the defendant.

F. W. Qua, for the plaintiffs.

BARKER, J. These were actions for personal injury and for damages to property sustained by reason of a defective highway. The accident occurred on March 18, 1891, when, although wagons were in use, there was still ice and snow upon the road, which was in a thinly settled part of the town. The plaintiff Daniel Carville was driving a team of four horses, which were drawing a wagon heavily loaded with stone. The wrought roadway was said by witnesses to have been from ten to thirteen feet wide from shoulder to shoulder, with a slope into the gutter upon the right as the team was going of from two feet to two and a half feet in depth, and the road was crossed by a brook which was carried under the roadway by a culvert covered with flat stones, the perpendicular distance from the top of the culvert to the bottom of the brook being about four feet.

The brook filled the culvert, so that, although there was another driveway through the brook, it was not in a condition for use. The width and configuration of the travelled way, the amount and condition of the ice upon it and of the snow in the

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gutters, and the exact place and manner of the accident were in dispute. It appears, however, that in some manner, at a point either about sixty-five feet from the culvert, or very near the culvert, the off rear wheel of the wagon left the travelled path and went down the slope into the gutter, and in an attempt to get the wagon again upon the usual path the wagon was overturned, and it and the wheel horses carried into the brook, and the injuries for which the actions are brought were occasioned.

One of the defects alleged in the declaration was a want of a sufficient railing, and the evidence was that there was no railing by the side of the wrought way. The plaintiffs contended that the road was narrower than it ought to have been, and rounding, and that the narrowness with the want of a barrier and the icy condition produced a defect in the whole situation arising from those circumstances; while the defendant contended that there was no defect, that the driver took upon himself the risk of an overturn, and that the accident was due to his negligence.

We consider only the questions raised by the defendant's brief and argument. The first is a question of evidence. Evidence was admitted to show that a witness called by the defendant had made out of court statements inconsistent with his testimony. The defendant contends that because the attention of its witness was not called to the time, place, and circumstances of his alleged contradictory statements when he was himself upon the stand, the evidence was inadmissible. But such a course is not necessary under our practice, when the witness is called by the opposite party. *Gould* v. *Norfolk Lead Co.* 9 Cush. 338. *Blake* v. *Stoddard*, 107 Mass. 111.

The other questions for decision arise upon the defendant's requests for rulings, that the evidence did not warrant verdicts for the plaintiffs; that if the driver saw the ice and snow before he reached it and knew that the road was dangerous, and voluntarily proceeded, he took the risk upon himself; and that if the driver was in such a position that it was his duty to do something which if done in one way would be dangerous but in another way would not, he was bound to adopt the latter course, and if he voluntarily adopted the dangerous one the plaintiffs could not recover. So far as the requests were correct in law, we think they were in substance given in the charge.

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While an examination of the testimony as it is reported gives us the impression that the defendant ought to have prevailed, we cannot say that, as matter of law, verdicts should have been ordered for the defendant. The jury would have been justified in finding that the way was not defective, and also that the driver not only failed to act with ordinary care, but recklessly and in disregard of the warning of others present brought on the accident by so attempting to pull the wagon again upon the roadway that the only result which could be reasonably expected was an overturn into the brook. But upon all these points there was a decided conflict of testimony, and there was evidence upon which the jury might find that the way was defective, and that the driver acted with ordinary care, and that the accident would not have occurred if the way had been reasonably safe and convenient.

A jury may find that a rounded roadway only eleven feet wide, and covered at least in part with smooth hard ice, and with a steep slope at the side into a gutter encumbered with snow where the roadway is crossed by a brook, and with no railing by the side of the roadway or upon the culvert, is a defective way, even in a sparsely settled locality and at the season when sleighing has just ended and travel is upon wheels.

So, too, a jury may find that when the off rear wheel of a four-horse wagon loaded with stone has been thrown into a gutter by passing over a stone upon the surface of a narrow, rounded, and icy roadway, at a point sixty-five feet from a culvert through which a brook crosses the roadway, the driver may in the exercise of due care attempt to pull the wagon back upon the usual path without unloading it, and may even continue his attempt until the wagon is overturned into the brook. Whether in this instance the driver's attempt, persisted in until the accident, was an exercise of ordinary care, was a question of fact for the jury. So, too, whether under all the circumstances the danger was so obvious and great and the exigency so slight as to make it a want of ordinary care for the driver to attempt to pass over the road, was a question for the jury. Although the driver knew the situation, it cannot be said, as matter of law, that he was not warranted in driving over the road, which was in common use by others as well as by himself. *Pomeroy* v. *Westfield*, 154 Mass. 462, 465. *Coffin* v. *Palmer*, 162 Mass. 192.

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It was in our opinion the duty of the presiding justice to submit to the jury the conflicting evidence bearing upon the questions whether the way was defective, and whether the plaintiffs were injured or their property damaged solely by reason of the defect, and not by the recklessness or want of care of one of the plaintiffs, who was in charge of the horses and wagon. The instructions given were accurate and careful, and gave proper rules for the guidance of the jury. *Exceptions overruled.*

ANDREW H. BELL & another *vs.* AMERICAN PROTECTIVE LEAGUE & another.

IN RE PETITION OF JAMES J. GRACE.

Suffolk. March 5, 6, 1895. — May 28, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Insolvent Corporation — Receiver — Assignment of Term — Liability on Covenants of Lease.

If a receiver of an insolvent corporation takes possession of its leasehold estate, he is liable only for a reasonable rent during the time that he retains possession; and he does not become an assignee of the term, and is not liable on the covenants of the lease.

PETITION of James J. Grace, that the receiver of the American Protective League, a fraternal beneficiary organization incorporated under St. 1888, c. 429, and St. 1890, c. 341, be ordered to fulfil the covenants of a lease given by the petitioner to the League.

Trial in the Superior Court, before *Hammond*, J., who reported the case for the determination of the full court, in substance as follows.

The lease, which was of a building on Tremont Street in Boston, was dated July 15, 1890, and was for the term of fourteen years and nine and a half months, at a rent varying from twelve to fifteen thousand dollars a year. In September, 1892, the League, which was insolvent, was enjoined from doing further business, and, on November 2, Henry W. Putnam, Esq. was duly appointed receiver, and qualified as such.

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The League could pay but a small dividend to the beneficiaries, whose lien on the fund in the hands of the receiver was prior to that of the general creditors. The receiver, soon after his appointment, relying upon the verbal promise of the petitioner that he would consent to a sale and assignment of the lease by the receiver for the benefit of the fund, took possession of the demised premises for the purpose of endeavoring to dispose of the lease, and, with the verbal consent of the petitioner and the approval of the judge, entered into a contract, dated December 17, 1893, with one Bradstreet for the sale of the leasehold interest. Thereupon the petitioner refused his consent to the assignment, and notified the receiver that the lease was forfeited by breach of condition; and Bradstreet refused to accept the assignment, and the receiver brought suit to compel specific performance of the contract of purchase, making the petitioner a party defendant. That suit was, in May, 1894, determined by the full court in favor of the defendant Bradstreet, on demurrer, and is reported 161 Mass. 237.

Meantime the receiver continued to pay rent under the lease, and otherwise perform the covenants thereof, until October 23, 1893, when, after tendering Bradstreet an assignment and notifying him of his intention, if it was not accepted, of disposing of the lease for his account, in such manner as the judge might order, he applied to the judge for leave to assign the lease to an irresponsible person, or abandon the same. The judge, at an *ex parte* hearing of which the petitioner had no notice, declined to authorize such an assignment, but authorized and directed the receiver to abandon the lease and the demised premises, which he did, giving the petitioner notice of the order of the judge, and that he had abandoned the lease and premises in pursuance thereof, and handing him the keys, which, on consulting counsel the next day, he immediately offered to return. The receiver never after the abandonment had any possession, or exercised any act of ownership, or collected any rents. The petitioner declined to take possession, and immediately brought this petition, upon which a hearing and argument was had in November, 1893, and the judge reserved his decision. At the hearing, it was agreed that the petitioner should take possession pending the decision, and collect the rents without prejudice to his claim

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under the petition, and the petitioner thereupon entered into possession under said arrangement, which lasted till June 16, 1894, and has remained in possession ever since, collecting the rents and profits.

In June, 1894, the judge not having rendered a decision on the petition, the receiver renewed the application formerly denied for leave to assign his interest and that of the League in the lease to an irresponsible person, and, after notice to the petitioner and a hearing, the application was granted, and an assignment was made to one Clancy of all the interest of the receiver and the League in the lease and the demised premises. The judge thereupon ruled that the receiver, by reason of the facts above reported, became liable by privity of estate upon the covenants in the lease, and continued so liable until the date of the assignment to Clancy; and entered a decree accordingly for $5,400, with interest from June 16, 1894; and the defendant appealed. If the above ruling was correct, the decree was to stand; otherwise, a decree was to be entered for the defendant, or for the plaintiff for such part of the above amount as to the court should seem proper.

G. Putnam, for the receiver.

R. M. Morse, (*G. P. Wardner* with him,) for the petitioner.

LATHROP, J. It does not clearly appear whether the Superior Court took jurisdiction of the bill in equity of Bell and others against the American Protective League by virtue of the general equity jurisdiction conferred upon it by the St. of 1883, c. 223, or by virtue of the St. 1892, c. 435, which gives to the Supreme Judicial Court and to the Superior Court "exclusive and concurrent jurisdiction in cases of insolvency, of the settlement of the affairs of corporations which are authorized to transact insurance upon the assessment plan, or of any fraternal beneficiary corporations which are so authorized," and which provides that, "to that end," the court "may appoint agents or receivers to take possession of the property and effects of the corporations, subject to such rules and orders as may from time to time be prescribed by said courts, or any justice thereof." The language of this statute follows the form of the decree long ago prescribed by this court appointing a receiver of an insolvent corporation, which form was adopted by the Superior Court

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when equity jurisdiction was conferred upon it. It makes no difference, therefore, whether the receiver was appointed under the general equity jurisdiction of the Superior Court or under the statute above referred to.

The question presented in this case is as to the correctness of the ruling of the Superior Court that the receiver, by reason of the facts reported, became liable, by privity of estate, upon the covenants of the lease, and continued so liable until the receiver assigned the lease to one Clancy.

It is a familiar doctrine of the common law, that while there is no privity of contract between the lessor and the assignee of a term, there is a privity of estate, which renders the assignee liable upon the covenants of the lease, so long as he holds the term. This applies not only to private individuals, but to assignees in bankruptcy and insolvency, as the title to the leasehold estate vests in them, provided they take possession.

But an assignee of a term or an assignee in bankruptcy may by assigning the term free himself from all further responsibility. And this assignment may be made to any one, however irresponsible he may be, provided the assignor does not retain any interest in the thing assigned. See 2 Platt, Leases, 400–452. The rights and duties of an assignee of an insolvent debtor are now regulated in this Commonwealth by the St. of 1879, c. 245, re-enacted in the Pub. Sts. c. 157, § 26. See *Abbott* v. *Stearns*, 139 Mass. 168.

The decree in the court below, that the petitioner was entitled to recover, apparently proceeded upon the ground that the same rule applied to a receiver as to an assignee in bankruptcy; and this seems to have been assumed to be the law in *Commonwealth* v. *Franklin Ins. Co.* 115 Mass. 278, 281. It is to be observed, however, that that case was submitted on briefs, as appears by the reporter's docket, and the question now before us was not taken by the counsel for the receivers, whose brief we have examined, nor was it discussed by the court. There were two petitions in the case, each relating to a separate parcel of land. One petition was dismissed, and the other was granted. In relation to the latter, the facts were that at the time the receivers were appointed the insurance company was lessee of a room in a building which it had prior to that time sublet. By the terms of

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the lease to the insurance company, when the receivers were appointed, two quarterly payments of rent would become due in the future. When the first became due, the lessors demanded the rent and threatened to eject the sublessee if the rent was not paid. Certain negotiations were had between the lessors and the receivers, which the court found amounted to an agreement by the receivers to pay to the lessors the rent in full for the first quarterly payment, and a dividend on the last payment. The first payment was made, and the controversy was as to the last payment under the lease, the lessors contending that they were entitled to the entire rent, and the receivers that, as they had not taken possession of the land, they were not liable at all. The decision of the court was that the agreement should be carried out; and the lessors "are therefore entitled to such dividend on the amount of rent and taxes so due as is paid to other creditors." It will be seen, therefore, that the case did not turn upon the effect of a receiver taking possession of a leasehold estate, but upon the effect of a contract made by receivers with the lessors of a leasehold estate, in relation to the rent.

It is difficult to see upon what principle a receiver, in the absence of a statute vesting the title of the insolvent in him, can, in any legal sense, be said to be the assignee of a term. In *Ellis* v. *Boston, Hartford, & Erie Railroad*, 107 Mass. 1, 28, it was said by Mr. Justice Wells, speaking of a decree of this court appointing receivers of a railroad company: "It had no effect to change the title, or create any lien upon the property. Its purpose, like that of an injunction *pendente lite*, was merely to preserve the property until the rights of all parties could be adjudged. The receivers are officers of the court for this purpose, and act under its direction and control."

A receiver is merely a ministerial officer of the court, or, as he is sometimes called, the hand of the court. The title to the property does not change; and if he is required to take property into his custody, such custody is that of the court. *Union Bank of Chicago* v. *Kansas City Bank*, 136 U. S. 223, 236. *Thompson* v. *Phenix Ins. Co.* 136 U. S. 287, 297.

The question now before the court was carefully considered in *Gaither* v. *Stockbridge*, 67 Md. 222; and it was held, as a necessary deduction from the principles which we have stated,

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that a receiver by taking possession of a leasehold estate did not become the assignee of the term. This case was cited with approval by Chief Justice Fuller, in the case of *Quincy, Missouri, & Pacific Railroad* v. *Humphreys*, 145 U. S. 82, 97, 98. It is true that the authority of the case as a precedent is somewhat weakened by the fact that the learned chief justice proceeded to show that the receivers in that case were not responsible on the covenants of the lease, even if they were regarded as assignees; and by the fact that in the subsequent case of *United States Trust Co.* v. *Wabash Western Railway*, 150 U. S. 287, Mr. Justice Brown, in delivering the opinion of the court, overlooks or disregards the language of Chief Justice Fuller, and considers a receiver to stand in the same position as an assignee. It was held, however, that the mere act of taking possession of leasehold property did not render the receiver liable on the covenants of the lease, but that he was entitled to a reasonable time after taking possession to determine whether to affirm the lease and retain the premises, or to give them up.

There are many cases in New York in which it is asserted that there is no difference between an assignee and a receiver who takes possession of leasehold premises. We understand, however, that in New York a receiver of an insolvent corporation has vested in him by statute the title of the insolvent. See *Attorney General* v. *Life & Fire Ins. Co.* 4 Paige, 224; *Booth* v. *Clark*, 17 How. 322, 331.

We regard the question presented in the case at bar as an open one in this Commonwealth, and, on principle, it seems to us that, if a receiver of an insolvent corporation takes possession of its leasehold estate, he is liable only for a reasonable rent during the time that he retains possession; that he does not become an assignee of the term, and is not liable on the covenants of the lease.

As the receiver paid rent to the satisfaction of the lessor, while in possession, we are of opinion that he is not liable for any further rent. It follows, therefore, that the decree of the Superior Court was erroneous, and must be reversed.

Decree accordingly.

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REUBEN P. JONES *vs.* JOHN S. PARKER & another.
SAME *vs.* ROBBINS B. GROVER & others.

Suffolk. March 11, 1895. — May 29, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Specific Performance of Covenant by Lessor to furnish Lessee with reasonable Light and Heat.

A lease for less than seven years of part of a basement in an uncompleted building contained a covenant "to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises." The building was completed, but the lessor and his assignee refused to put into the premises apparatus sufficient to heat and light them, or to deliver them to his lessee. *Held*, on demurrer to a bill for specific performance, that the contract was sufficiently certain; that superintending the completion of the apparatus was not more than a court of equity would undertake; that the covenant required the apparatus to be on the premises at the moment of delivery; that, as the lease was not required to be recorded, (Pub. Sts. c. 120, § 4,) the assignment of it did not authorize the assignee to prevent the performance of the covenant, whether he had notice of it or not; and that whether the burden of the covenant passed to him or not, under St. 32 Hen. VIII. c. 34, § 2, (as to which *quære*,) the assignment did not discharge the covenantor.

TWO BILLS IN EQUITY, filed June 2, 1894, to enforce specific performance of covenants in leases.

The first bill alleged that, by an indenture dated September 1, 1893, the defendant Parker leased to the plaintiff a portion of the basement in a building to be erected on the corner of Washington Street and Spring Lane in the city of Boston, and covenanted to deliver possession of the same to the plaintiff upon completion of the building, and thereafter, during the term of the lease, reasonably to heat and light the demised premises; that the occupancy of the demised premises by the plaintiff for the purposes contemplated and stipulated for in the lease was impossible without the completion by the defendants of the premises by constructing therein proper apparatus for heating and lighting the same before delivery thereof to the plaintiff; that the building had been completed, and that the interest of the defendant Parker in the building had been assigned to the

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defendant Emma M. Blackall; that the defendants refused to complete the premises leased to the plaintiff by the construction of apparatus sufficient reasonably to heat and light the same, or to deliver them to the plaintiff, and proposed to rent them to some person other than the plaintiff.

The prayer of the bill was that the defendants be restrained from leasing the premises to any person other than the plaintiff; that they be ordered to complete and deliver them to the plaintiff, with apparatus sufficient reasonably to heat and light the same, and for damages.

The indenture, a copy of which was annexed to the bill, was executed, September 1, 1893, between John S. Parker, lessor, and R. P. Jones of the second part, and leased the premises in question to the plaintiff for the term of six years and eight months from the date thereof, and contained a covenant by the lessor "to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises."

The second bill sought like relief with respect to other premises in the basement of the same building demised to the plaintiff by the defendant Grover and others, lessors, parties of the first part, for the period of ten years, by an indenture bearing date November 7, 1892, and recorded, which contained a covenant "to deliver possession of the said basement to the lessee upon completion; and from such delivery, and thereafter during the term of this lease, reasonably to heat and light the demised premises without expense to the lessee." The second bill contained no averment that the lease annexed thereto had been assigned.

The defendants demurred to the bills, and assigned as reasons therefor, applicable to both bills: 1. want of equity; 2. that the plaintiff had a plain, adequate, and complete remedy at law; 3. that it did not appear that at any time since the completion of the building containing the demised premises the plaintiff was ready and willing to accept possession thereof upon delivery by the defendants in accordance with the terms of the indentures; and, as applicable to the first bill only: 1. that it did not appear that the plaintiff was willing to accept possession of the premises unless the defendants would, before such acceptance, do

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what, by the terms of the obligation, they were under no obligation to do, viz. complete such premises with apparatus sufficient reasonably to heat and light the same; and 2. that the defendants were under no obligation, as alleged by the bill, to complete the demised premises with apparatus for heating and lighting, or to do anything in relation to heating and lighting such premises before the plaintiff was bound to accept possession of the same.

At the hearing in the Superior Court, the demurrers were sustained, and the bills dismissed; and the plaintiff appealed to this court.

J. Willard, for the plaintiff.

G. L. Wentworth, for the defendants.

HOLMES, J. The case of *Jones* v. *Parker* is a bill in equity brought by a lessee upon a lease purporting to begin on September 1, 1893, and to demise part of a basement in a building not yet erected. The lessor "covenants to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises." It is alleged that the building has been completed, but that the defendants refuse to complete the premises with apparatus sufficient to heat and light the same, and to deliver the same to the plaintiff. It also is alleged that the occupancy of the premises for the purpose contemplated in the lease was impossible without the construction in the premises of proper apparatus for heating and lighting them before delivery to the plaintiff. The prayer is for specific performance of the covenant quoted, and for damages. The defendant demurs.

It does not need argument to show that the covenant is valid. Whether it should be enforced specifically admits of more doubt, the questions being whether it is certain enough for that purpose, Fry, Spec. Perf. (3d ed.) §§ 380–386, and whether a decree for specific performance would not call on the court to do more than it is in the habit of undertaking. *Lucas* v. *Commerford*, 3 Bro. Ch. 166, 167. *Ross* v. *Union Pacific Railway*, Wool. 26, 43. We are of opinion that specific performance should be decreed. With regard to the want of certainty of the covenant, if the plaintiff were left to an action at law, a jury would have to determine whether what was done amounted to a reasonable heating and

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lighting. A judge sitting without a jury would find no difficulty in deciding the same question. We do not doubt that an expert would find it as easy to frame a scheme for doing the work. The other question is practical rather than a matter of precedent. It fairly is to be supposed, in the present case, that the difference between the plaintiff and the defendants is only with regard to the necessity of some more or less elaborate apparatus for light and heat, a difference which lies within a narrow compass and which can be adjusted by the court. There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time. Fry, Spec. Perf. (3d ed.) §§ 88, 98, 102, 103. Story, Eq. Jur. §§ 725–728. Y. B. 8 Ed. IV. pl. 11. *Tyngelden* v. *Warham*, 2 Cal. Ch. liv.

A further objection is taken, that the instrument is a lease and therefore there is a remedy for possession of the premises at law, and that the covenant to heat and light is not to be performed until after possession is taken. It would be a sufficient answer that performance of the covenant to heat and light was to begin at the moment of performance of the covenant to deliver possession, and that the defendant is alleged to have repudiated both of these obligations. But we may go further. According to the allegations of the bill, occupation of the premises for the contemplated purposes is impossible without the completion of them by the construction therein of proper apparatus for heating and lighting. The covenant itself affords an argument that artificial light and heat were necessary constituents of the premises, as natural light was in *Brande* v. *Grace*, 154 Mass. 210, or a cistern in *Cleves* v. *Willoughby*, 7 Hill, (N. Y.) 83, 90, 91. It is "so interwoven with the original contract as to become an essential part of it." *Bally* v. *Wells*, Wilmot, 341, 350. If so, the plaintiff would not be bound to accept possession if offered without artificial light and heat, (*Cleves* v. *Willoughby*, *ubi supra*,) and although it has been said with truth, in a different class of cases, that the mode in which one party to a bargain shall enable himself to do what he has agreed to do is no part of the contract, *Pratt* v. *American Bell Telephone Co.* 141 Mass. 225, 229, the present covenant fairly may be construed to mean that, at the moment

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when delivery of possession is due there shall be the necessary machinery or apparatus without which it would be impossible "thereafter . . . reasonably to heat and light the demised premises." See *Bullard* v. *Shirley*, 153 Mass. 559, 560.

The last objection taken is based on an allegation that the lessor Parker has conveyed the reversion to Blackall. It is not alleged that Blackall had notice of Parker's covenant. But as the lease is for less than seven years, it is valid without recording or notice, Pub. Sts. c. 120, § 4, and the assignment does not entitle Blackall to prevent the performance of the covenant. We need not consider whether the covenant runs with the reversion by virtue of St. 32 Hen. VIII. c. 34, § 2, a question not to be confused with the different one as to the covenants attaching a burden or a right to land at common law irrespective of privity or the mention of assigns, after the analogy of commons or easements, or the yet different one as to the transfer of the benefit of warranties or covenants for title to assigns, when mentioned, being privies in estate with the original covenantees. *Norcross* v. *James*, 140 Mass. 188. *Middlefield* v. *Church Mills Knitting Co.* 160 Mass. 267. This covenant is pretty near the line as it has been drawn between covenants that will and those that will not pass under the statute in respect of their nature, assigns are not mentioned, and the plaintiff has not entered; but perhaps none of these objections would be fatal. *Spencer's case*, 5 Co. Rep. 16, and note to *S. C.* in 1 Sm. Lead. Cas. 145, 150–174. Moore, 159, pl. 300. *Jourdain* v. *Wilson*, 4 B. & Ald. 266, 268. *Doughty* v. *Bowman*, 11 Q. B. 444. *Minshull* v. *Oakes*, 2 H. & N. 793, 808. Rawle, Covenants, (5th ed.) §§ 318, 318. *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238. *Simonds* v. *Turner*, 120 Mass. 328. However this may be, the plaintiff is entitled to his lease and to his heat and light, notwithstanding the assignment, and whether the covenant passes or not he can hold the defendant Parker on his express contract. All the cases which have come under our eye are cases of covenants by lessees, but the reasoning is equally good for covenants by lessors. *Wall* v. *Hinds*, 4 Gray, 256, 266. *Mason* v. *Smith*, 131 Mass. 510, 511. *Barnard* v. *Godscall*, Cro. Jac. 309. *Brett* v. *Cumberland*, Cro. Jac. 521. *Bachelour* v. *Gage*, Cro. Car. 188. *Pitcher* v. *Tovey*, 4 Mod. 71, 76. *Auriol* v. *Mills*, 4 T. R. 94, 98, 99.

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In the case of *Jones* v. *Grover* the covenant is substantially similar to that in the first case. The instrument, although in form a lease for ten years, is not to begin to run until the completion and delivery of the premises. It has been recorded, and there has been no assignment. The plaintiff's title to relief is free from some of the difficulties which have been discussed.

Demurrers overruled.

ANNIE D. SMITH *vs.* NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Suffolk. March 19, 1895. — June 3, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Trespass quare Clausum — Abandonment — Evidence — Res inter alios — Plan.

On the issue of the abandonment of part of a railroad location originally five rods wide, evidence was offered that the owner of land adjoining the locus filed a petition to the county commissioners for the assessment of damages for land taken from him, in which it was alleged that the railroad had taken a strip "four rods in width or thereabouts"; that damages were awarded, which, by agreement of the parties, were to be paid within a time limited, whereupon the railroad company was to receive a deed of land extending more than two and a half rods on the other side from the centre line of the road and up to the locus; and that the deed was delivered in escrow. The damages were not paid by the company as agreed, nor was the deed delivered to it. *Held*, that the evidence was inadmissible.

On the issue of abandonment of part of a location originally five rods wide, a deed to the railroad company of land eight hundred feet away from the locus, tending to show that the road there was only four rods wide, is inadmissible.

On the same issue, a lithographic plan of house lots, referred to in such deed for the lot conveyed, purporting to show the railroad for a considerable distance including the locus, but not purporting to be drawn to scale, is inadmissible.

TORT, for breaking and entering the plaintiff's close and erecting a fence thereon. Writ dated April 1, 1891. Trial in the Superior Court without a jury, before *Dunbar*, J., who allowed a bill of exceptions, in substance as follows.

The premises in controversy are situated on the east side of the defendant's railroad near the Harvard Street station in the city of Boston, and consist of a strip of land lying between two

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lines, one of which is two rods and the other two and a half rods easterly of the centre line of the location of the railroad. The original location of the road at this point, filed April 27, 1854, by the Boston and New York Central Railroad Company, the defendant's predecessor, was five rods wide, and included the strip in question, which, it is contended by the plaintiff, was subsequently abandoned. Prior to the filing of such location by the railroad company, this strip was comprised in a farm of about twenty acres owned by one Tolman, who on April 3, 1854, sold a portion of it containing about four acres, known as the Tolman lot, to one William L. Carlton. It was contended by the plaintiff that the easterly boundary of the land so sold coincided with the extended westerly line of the strips in question two rods east of the centre line of the defendant's railroad as subsequently located. At the time of the sale there was no fence or natural boundary on the division line between the lots, but it appeared that one was built there two or three years later and maintained until 1888. At the time of the location of the railroad Carlton was the owner of the next two adjoining lots of land north of the lot purchased by him from Tolman, through which the location ran. These were known respectively as the Carlton and Pierce lots.

Two years after the location was filed, Carlton having deceased, his administrator filed a petition to the county commissioners asking for an assessment of the damages for the taking of his land, in which he alleged that the land taken "for the building of said railroad and for railroad purposes" from each of the lots owned by him was a strip "four rods in width or thereabouts." Upon this petition, by consent of the parties thereto, the county commissioners, on March 9, 1857, awarded damages in the sum of $15,171.77, and described the land taken as it was described in the petition.

The record of these proceedings was admitted, subject to the exception of the defendant, and an agreement, and a deed referred to in it bearing the same date as the decree of the county commissioners, were also admitted, subject to the exception of the defendant, by which it appeared that the railroad company was to pay to the administrator the damages awarded, with interest, within three years from that date, and was to receive deeds

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signed by the heirs of Carlton which together covered the strip four rods wide through all of these lots, one deed being made for each lot, and these deeds were delivered in escrow, with the provision that any deed might be taken by the company on payment of that portion of the money which was mentioned as the price of the land conveyed by it. It was further stipulated that, if the whole amount was not paid, with interest, within three years, the deeds should be returned to the grantors, and the railroad company should have no right to the land except that derived from its location, and should be liable for the payment of the commissioners' award. The sum mentioned in the agreement was not paid within the time limited therein, and the deeds of the lots which had been delivered in escrow were never delivered to the railroad company. The descriptions in the deeds of the Carlton and Pierce lots delivered in escrow covered a strip four rods in width only, while the description in the deed of the Tolman lot covered nearly all the land sold by Tolman to Carlton. The agreement between the railroad company and the heirs of Carlton did not include the half-rod strip which is now in controversy.

The plaintiff also offered in evidence a deed dated August 4, 1873, from one Pinkham to William T. Hart and Charles P. Clark, who, as trustees, were in possession of the property of the Boston, Hartford, and Erie Railroad Company, a successor in title of the Boston and New York Central Railroad Company. By this deed, as the plaintiff contended, land was conveyed to within two rods of the centre line of the defendant's location where its Harvard Street station now stands. Of the land so conveyed the point nearest to the strip now in controversy was distant eight hundred feet therefrom, and on the opposite side of the track. This deed, which was admitted subject to the exception of the defendant, referred to an extended lithographic plan of land belonging to the Mt. Bowdoin Land Associates, in which, on the outskirts of the land, was laid down, for a considerable distance, the track of the Boston, Hartford, and Erie Railroad, the defendant's predecessor. The plan contained no scale, and a witness who testified that the original was made in his office also testified that the scale of the plan referred to, which was a reduced lithographic scale, would appear

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different by measurement; but he stated that he was very familiar with the plan, and that the width of the road, as shown, was about four rods at different places, including the place in question.

The judge found for the plaintiff; and the defendant alleged exceptions.

F. A. Farnham, for the defendant.

E. O. Achorn, for the plaintiff.

HOLMES, J. This is an action of tort, in which the question is whether a strip of land half a rod wide on the east side of the defendant's road-bed belongs to the plaintiff or to the defendant. The land is to the south of the lands in controversy in *Bicknell* v. *New York & New England Railroad*, 161 Mass. 428, and in *Westcott* v. *New York & New England Railroad*, 152 Mass. 465, and is on the east side of the road-bed. In this case, as in those, it is to be taken that the original location was five rods wide, and included the strip in question, and the only issue is whether it had been narrowed by abandonment of this strip. The principal exception is to the admission of the documents mentioned in the cases named. These documents are a petition to the county commissioners by the administrator of one William L. Carlton, for the assessment of damages for land taken by the location, the decision of the county commissioners thereon by consent of the parties, and a deed executed in escrow by the widow and heirs of Carlton as part of the same transaction, together with the agreement as to the terms and conditions for its delivery.

The documents were held to be admissible in the former cases, but the present case is materially different. The land now in controversy did not belong to Carlton, but lay just outside his line, which only extended to what has been called the four-rod line, on the east side of the location. Of course, therefore, the proceedings on behalf of his estate could not affect or deal with this strip. They did not purport to do so in any way, or contain any language about it. If the escrow had been delivered, which it was not, it would have afforded no argument from probabilities that the location extended only two rods to the east of the centre line, on the ground that it was only two rods on the west. On the contrary, the escrow would have conveyed at this

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place the whole of the Tolman lot, so called, belonging to Carlton, which was much more than two rods and a half on the west of the centre line. No argument in favor of abandonment can be drawn from the fact that the road was only four rods wide further to the north; for the location was five rods, and the greater part of the road unquestionably is five rods wide. This escrow contained no language like that in the Bicknell case, importing that a tract only four rods wide was the whole road-bed of the defendant at that point. The only expression which could be laid hold of as possibly affecting the defendant's right is a general allegation in the petition to the county commissioners that the railroad had taken from the parcels belonging to Carlton "a strip of land four rods in width or thereabouts." If this allegation were more specific than it is, it still would leave untouched the question what land the railroad had taken not belonging to Carlton. We are of opinion that in this case the documents should have been excluded.

The other exception relates to the admission of a deed of land eight hundred feet distant from the strip in question, and a plan referred to in the deed. In the Westcott case the deed was admitted, as it conveyed a part of the land then in controversy. But, for the reason already given, the fact, if it be one, that the railroad did not claim other land outside the four-rod line, does not tend to prove that it did not claim this. The deed was not admissible as a conveyance. It was argued that the plan referred to was admissible on independent grounds. It is an extended lithographic plan of land belonging to the Mt. Bowdoin Land Associates, and on the outskirts of the land is laid down the track of the defendant's predecessor, the Boston, Hartford, and Erie Railroad, for a very considerable distance. A witness who testified that the original was made in his office testified also that the scale of the plan referred to was a reduced lithographic scale, and that the scale would appear different by measurement, but stated that he was very familiar with the plan and that the width of the road as shown was about four rods at different places, including the place in question. The width to the eye is the same throughout. The plan does not purport to be drawn to scale. It seems to us quite impossible to say that the railroad, by accepting a deed referring to a different part of

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the plan, admits or may be argued to have admitted that the width attributed to its road is correct throughout its whole length, without having any intimation on the face of the paper what that width is supposed to be, and the purpose of the reference to it having no bearing on the matter, except in one small and distant spot. *Exceptions sustained.*

ERASTUS M. NASH, & another, trustees, & others, *vs.* MINNESOTA TITLE INSURANCE AND TRUST COMPANY.

Suffolk. November 13, 14, 1894. — June 12, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Deceit — False Representations — Burden of Proof — Evidence of Defendant's Intention — Testimony of Deceased Witness at Former Trial — Admission.

In an action of deceit founded on alleged false representations of the defendant contained in a letter, the plaintiff must prove actual fraud, and, so far as the words of the letter are susceptible of explanation, the defendant may show that they were not used in the sense imputed to them by the plaintiff, and that he acted honestly, and that there was no intention on his part to state anything falsely. FIELD, C. J. & HOLMES, J. dissenting.

The rule that, on a rescission of a contract for fraud, the plaintiff in an action between the original contracting parties can recover back from the defendant the whole consideration paid for the goods, does not apply where the defendant is a stranger to the consideration, in which case the measure of damages is the difference between the actual value of the goods and their value as it would have been if the representation had been true; and a plaintiff who was induced to purchase goods by the fraudulent representations of the defendant, and who has parted with the goods, may recover under a declaration in tort which goes upon a rescission of the contract, if the declaration sufficiently charges the fraud and the damage to the plaintiff resulting from it, after striking out everything alleged in regard to rescission.

In an action of deceit by A. and others against B., founded on false representations of B. contained in a letter to C. as to the title of certain real estate upon which bonds were issued by C., another letter from B. to D. is competent evidence against B., not only as a statement that C. said he sold bonds to D., who was one of the plaintiffs and who acted as agent of others of the plaintiffs in the purchase of bonds from C., but as an assumption that what he said was true, and as an implication that the information had been communicated in such a way and under such circumstances as to be trustworthy, the letter being in the nature of an admission that the sale had been made as C. said it had.

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ELEVEN CASES for false and fraudulent representations made by the defendant, whereby the plaintiffs were induced to purchase certain bonds whose payment was secured by a mortgage to the defendant of certain real estate in Minneapolis in the State of Minnesota.

The declaration in the first case alleged that the defendant corporation was duly established under the laws of the State of Minnesota, with its principal place of business in Minneapolis in that State, to examine and insure titles and to act as trustee under trust deeds and mortgages; that it sent out its circulars to that effect, and had thereby done a large business in the State of Massachusetts; that about February 1, 1890, it contracted with George Walter Davis to receive a certain tract of land in Minneapolis known as the "Hedderly tract" (description given); that the defendant contracted to act as trustee under the conveyance for the payment of $150,000 of bonds of Davis, to be issued and sold by him, and contracted to issue to each purchaser a policy of title insurance, insuring the title to the tract to be free from encumbrance; that the defendant on February 1, 1890, as a consideration for the contract, received from Davis the sum of one thousand dollars and a conveyance in fee and mortgage in trust of the land, upon the issuance by Davis of the bonds certified as trustee upon each bond, that it was one of the series amounting to $150,000, and after having certified all of said bonds, delivered them to Davis; that in order to induce the persons to whom Davis might offer the bonds to become purchasers, the defendant, on or about February 6, 1890, gave Davis a letter falsely and fraudulently representing that the tract of land was free from encumbrance, whereas it was subject to a prior mortgage of $30,000; that all the defendant's representations were known by it to be false and untrue; that the letter aforesaid was shown by Davis to the plaintiffs, who, deceived thereby and relying thereon, were induced to purchase and did purchase seven of said bonds, amounting to $6,500, which, with the policy of title insurance of the defendant, were delivered to the plaintiffs; that the interest maturing on said bonds on August 1, 1890, was paid by Davis; that the interest maturing on February 1, 1891, was not paid; that thereafter the plaintiffs discovered the false and fraudulent character of the defendant's

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representations, and on May 1, 1891, elected to rescind, and did rescind and repudiate their purchase of bonds from Davis, and notified him thereof, and tendered to him the bonds with interest paid since the purchase, with interest on interest to the said May 1st, and tendered to him the title insurance policy and demanded of him the repayment of the amounts paid to him for the bonds, with interest to the day of tender; that Davis declined to receive the bonds, policy, and money, and refused to pay and continues to refuse to pay the sums demanded; that thereafter the plaintiffs notified the defendant of the rescission and repudiation of the plaintiffs, and of Davis's declination to accept the tender, and made the same demand upon and tender to the defendant which they had made to Davis; that the defendant refused to accept said tender or to pay the plaintiffs the sums demanded; that the plaintiffs thereupon brought into court the bonds and coupons, the amount of coupons paid on August 1, 1890, with interest thereon to May 1, 1891, and the policy of title insurance issued to the plaintiffs by the defendant, and tendered the same to the defendant.

The declaration in each of the other cases was the same, except the allegation of the number of bonds and the alleged value.

The answer was: 1. A general denial. 2. That "on February 6, 1890, and for many months prior thereto, there had been upon the Hedderly tract, so called, a mortgage held and owned by one Henry W. Bartol, which mortgage was not then due. And the defendant says, that in order to protect itself and the *bona fide* holders of any bonds, and any policies of insurance covering said Hedderly tract, this defendant did, when said mortgage became due, purchase the same, and has since discharged the same so that it is no longer an encumbrance upon said tract of land. And this defendant says that the plaintiffs, if they shall prove that they have ever purchased and owned any of said Davis bonds, so called, did accept from this defendant a policy of title insurance indemnifying them against all defects in the title to said Hedderly tract."

Trial in the Superior Court, before *Braley*, J., who ruled that, it appearing that after the rescission and cancellation of the contract with Davis notice was communicated of that fact to the defendant, and tender made of the bonds, etc., the measure

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of damages in each case, except that of Jeremiah Plympton, who was one of the plaintiffs, would be the amount of money paid by each plaintiff for bonds, with interest thereon from the time of purchase and by agreement of the plaintiffs, less the amount of interest received on account of the bonds, with interest upon that interest deducted.

The jury returned verdicts for the several plaintiffs with the exception of Plympton, in accordance with the instructions of the judge; and the defendant alleged exceptions.

The case was argued at the bar in November, 1894, and afterwards was submitted on the briefs to all the judges.

A. A. Strout & E. L. Rand, for the defendant.

R. M. Morse & J. W. Keith, for the plaintiffs.

KNOWLTON, J. These cases have once before been considered by this court, (see 159 Mass. 437,) and the principal question then raised was whether there was any evidence of fraud on the part of the defendant. It was held that the defendant's statement in regard to the title, taken in connection with the context of the letter and the circumstances under which it was written, purported to be a representation that the defendant had examined the title to the mortgaged real estate, and had found it to be perfect.* The property was subject to a prior mortgage of thirty thousand dollars, as the defendant's officers well knew. On this part of the case the only question was whether there was any evidence of fraud to submit to the jury, not whether there might be explanations which would relieve the defendant from the imputation against it. At the last trial the defendant offered to show that the words were not used in the sense in which they were understood by this court, and that its officers acted honestly, and that there was no intention on their part to state anything falsely. The evidence was rejected, and the ruling was, in substance, that in view of the admitted facts that the defendant's officer knew of the existence of the prior mortgage, and that this letter was to be used to induce persons to buy the mortgage bonds, the representation was, as matter of law, fraudulent. The exception to this ruling presents the question,

* The facts in these cases may be found in the report of the cases of *Nash v. Minnesota Title Ins. & Trust Co.* 159 Mass. 437.

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What must be proved to establish a charge of an actionable false and fraudulent representation? On the precise question now before us the law of England has been finally settled by the case of *Derry* v. *Peek*, 14 App. Cas. 337, in which it was held unanimously that in an action of deceit there can be no recovery unless fraud is proved. In delivering the principal opinion, Lord Herschell said: "I think the authorities establish the following propositions. First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." In other parts of the opinion, and in the opinions of the other law lords in the same case, and in other cases which have since been decided, it is made clear that by the law of England mere ignorance, or negligence, or stupidity on the part of the person making the representations does not constitute fraud if he intends honestly to tell the truth, although his statements understood according to their seeming meaning may be ever so misleading. *Glasier* v. *Rolls*, 42 Ch. D. 436. *Angus* v. *Clifford*, [1891] 2 Ch. 449. *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491. In this particular the decisions in this Commonwealth are of similar import. *Tryon* v. *Whitmarsh*, 1 Met. 1. *Page* v. *Bent*, 2 Met. 371. *Pearson* v. *Howe*, 1 Allen, 207. *King* v. *Eagle Mills*, 10 Allen, 548. *Hartford Live Stock Ins. Co.* v. *Matthews*, 102 Mass. 221. *Fisher* v. *Mellen*, 103 Mass. 503. *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403. *Holst* v. *Stewart*, 154 Mass. 445. See also *Page* v. *Parker*, 40 N. H. 47; *Hammatt* v. *Emerson*, 27 Maine, 308; *Marsh* v.

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Falker, 40 N. Y. 562; *Chester* v. *Comstock*, 40 N. Y. 575; *Cowley* v. *Smith*, 17 Vroom, 380.

There is a good reason for this rule. The general test to determine whether there is a liability in an action of tort is the question whether the defendant has by act or omission disregarded his duty. In applying this test, it is always necessary first to inquire what the defendant's duty is. In an action of deceit the defendant is ordinarily sued as one whose only relation to the transaction was that of a gratuitous informer, who had no interest in the subject to which the representations related. On the necessary allegations of the declaration he may be assumed to have answered inquiries put by a stranger, or to have volunteered statements out of apparent friendship. Under such circumstances, although he thinks that his statements will be acted upon by the inquirer, he has no higher duty than to answer honestly and in good faith. If one makes a statement for a consideration as a part of a contract, it is his duty to be accurate, and ignorance or mistake will not relieve him from the consequences of an error. In seeking a remedy from him for a mistake so made, the plaintiff in his declaration states his relation to the transaction, and sues in contract. But one who merely answers the inquiries of a stranger, or courteously volunteers information in a matter which does not concern him, is in a position analogous to that of a gratuitous bailee of property, from whom a less degree of care is required than from a bailee for hire. He must not intentionally mislead; but if he answers honestly to the best of his ability, he does his whole duty. If he is an ignorant, stupid man, and on that account the inquirer is led astray, it is not his fault, but the fault or misfortune of the person who relies upon him. It would be unjust to visit upon him the consequences of his ignorance in a matter in which he had no interest.

If he happens to have an interest in the subject to which his representations relate, it is a matter of which the law takes no cognizance in an action of deceit. It is not necessary to allege or prove it; and proof of it does not affect the rights of the parties, unless the proof goes far enough to create a liability of another kind.

Of course one will be presumed to have intended his language

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to be understood according to its usual meaning, and in ordinary cases, in the absence of a reasonable explanation of his mistake, his testimony that he meant something different from what he said will have but little, if any weight. But inasmuch as the question involved is what was his state of mind, and his actual intent as distinguished from his apparent intent, he is entitled to explain his language as best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which the alleged fraud relates. In this respect his expressions, whether spoken or written, are not dealt with in the same way as when the question is what contract has been made between two persons who were mutually relying upon the language used in their agreement. *Hazard* v. *Loring*, 10 Cush. 267. *Thacher* v. *Phinney*, 7 Allen, 146. *Brown* v. *Massachusetts Title Ins. Co.* 151 Mass. 127. *Snow* v. *Paine*, 114 Mass. 520, 526. *Edwards* v. *Currier*, 43 Maine, 474. *Norris* v. *Morrill*, 40 N. H. 395, 401. *Gifford* v. *Thomas*, 62 Vt. 34, 35. *Seymour* v. *Wilson*, 4 Kernan, 567. *Thurston* v. *Cornell*, 38 N.Y. 281. *Phelps* v. *George's Creek & Cumberland Railroad*, 60 Md. 536. *Berkey* v. *Judd*, 22 Minn. 287.

In the present case we need not determine whether the excluded evidence on this subject was very important. It is obvious that, if the defendant's officers knew that their statement in regard to the title was false in the sense in which they supposed it would generally be understood, it is immaterial whether or not they had a purpose to do injury or cause loss to anybody who might rely upon it. It is enough to furnish the foundation for a liability, if they used language in regard to the title which they intended should be understood as a representation that the title was perfect when they knew it was not perfect. *Forbes* v. *Howe*, 102 Mass. 427. *Nash* v. *Minnesota Title Ins. & Trust Co.* 159 Mass. 437. *Commonwealth* v. *Coe*, 115 Mass. 481. *Spaulding* v. *Knight*, 116 Mass. 148. But a majority of the court are of opinion that it was competent for them to testify what their understanding was in regard to the meaning of the representation, and that the presiding justice gave too broad an interpretation to our former decision in the case.

The next exception relates to the rule of damages. The pre-

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siding justice ruled that, on a rescission of the contract for fraud, the plaintiffs could recover back from this defendant the whole consideration paid for the bonds. That is the rule where the suit is between the original contracting parties. The reason of the rule is that on a rescission of a contract the contract is avoided *ab initio*, and the rights of the parties in reference to the subject matter of it are as if no contract had ever been made. *Milliken* v. *Thorndike*, 103 Mass. 382. *Bassett* v. *Brown*, 105 Mass. 551. *Nealon* v. *Henry*, 131 Mass. 153. *Ballou* v. *Billings*, 136 Mass. 307, 309. *Snow* v. *Alley*, 144 Mass. 546. But the defendant in this case is a stranger to the consideration, and his relation to the contracting parties is not such as to make this reason applicable. The rule of damages in an action against a tortfeasor is that the plaintiff shall recover an amount commensurate with the wrong done him. In a suit for a fraud in a sale of personal property, the measure of damages in common cases is the difference between the actual value of the goods and their value as it would have been if the representation had been true. This will ordinarily make good the loss of the defrauded party. *Morse* v. *Hutchins*, 102 Mass. 439. *Page* v. *Parker*, 43 N. H. 363. *Northrop* v. *Hill*, 57 N. Y. 351, 357. That is the general rule in cases like the present, and the important question before us is whether there is anything in the facts disclosed that warrants the application of a different rule.

It is clear that mere fraud of a third party which induces the purchase of goods will not give the purchaser a right to rescind the contract. If the seller is not a party to the fraud, the contract must stand. *Root* v. *Bancroft*, 8 Gray, 619. *White* v. *Graves*, 107 Mass. 325. *Martin* v. *Campbell*, 120 Mass. 126. *Fort Dearborn National Bank* v. *Carter*, 152 Mass. 34, 38. *Pulsford* v. *Richards*, 17 Beav. 87, 95. *Masters* v. *Ibberson*, 8 C. B. 100. It is clear, therefore, in such a case, that the injured party can recover damages for the injury only under the common rule. Looking then only at the relations of the parties to this suit to each other, without regard to the conduct of the seller of the bonds, it will be conceded that there is no right of rescission, and no right to recover back the consideration. If we assume, as we well may on the facts of this case, that the seller was a party to the fraud and knowingly received the benefit of it, there is a

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right of rescission and a right to recover back the consideration in favor of the plaintiff as against him. But that right grows out of the conduct of the seller of the bonds in practising the fraud, and it does not bring the defendant corporation into any relation to the consideration, nor make it a party to the contract, nor create any new rights in favor of the plaintiff against it. *Wyeth* v. *Morris*, 13 Hun, 338. *Marston* v. *Singapore Rattan Co.* *ante*, 296. As a preliminary to the right to sue for the consideration, there must be a return or a tender of return of the property that will put the other party *in statu quo*. The plaintiff, having made a tender of the bonds to Davis, the seller of them, who refused to receive them, made a similar tender to the defendant. There is a manifest inconsistency between an attempt to get back the consideration from Davis on the ground that the property in the bonds was returned to him by reason of the rescission, and an attempt to turn over the property to the defendant without the consent of Davis, and thereby to make it accountable for the money originally paid to Davis. In rescinding a contract, and in enforcing rights growing out of such rescission, one would expect to look only to the other party to the contract. The nature and effect of rescission are such that they can have no consequences except as against the other party to the contract. The only injury which the law recognizes as done to the plaintiff by the defendant in this case was by a false representation that the title to the property was perfect. Whatever the plaintiffs may have suffered from other causes, their loss from this cause will be made up to them if the defendant pays the difference between the value of the bonds as they were and their value as they would have been if the title had been perfect. We do not think the plaintiffs' rescission of the contract on account of the fraud defeats their right to recover these damages from a third party, so long as they have failed to obtain satisfaction for their injury, either by a restoration or recovery of the consideration, or otherwise.

The only case relied on by the plaintiffs in support of a different rule of damages is *Hedden* v. *Griffin*, 136 Mass. 229. On a hasty reading of that case, it might seem to be an authority in favor of the plaintiffs' contention on this point, but a more careful examination will show that it is not. No such question as

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that now before us was raised or considered in that case. The question was whether the plaintiff, who had been induced by the fraud of an agent of a life insurance company to take out a policy of life insurance, could, on discovering the fraud six months afterwards, rescind the contract, return his policy, and recover back the premium paid. He had enjoyed protection for six months under a policy which the company could not avoid, and if he had deceased before discovering the fraud his administrator might have collected from the company the sum of ten thousand dollars; but it was held that he was not thereby precluded from rescinding the contract and recovering back the consideration, less the value, if any, of the insurance which he had received under the contract. It was intimated in the opinion, although not decided, that he could recover back the whole consideration, without any deduction for the protection which he had before rescinding the contract. The transaction was not a sale of goods, but a contract for the most part executory. So far as the contract was still executory at the time of the discovery of the fraud, he plainly should have a right to rescind. See *Fisher* v. *Metropolitan Ins. Co.* 160 Mass. 386; *S. C.* 162 Mass. 236. What the rule would be if such a policy remained in force a much longer time before discovery of the fraud was not stated, but no question was made in the case in regard to the right to recover of the agent who committed the fraud to the same extent as if the suit had been against the principal. Under the facts of that case, such a question could not successfully have been raised by the defendant. The money which was obtained by the fraud was paid into his hands by the plaintiff. On a rescission of the contract, the contract was annihilated, and after a demand the guilty agent could not justify under it either his payment of the money to his principal, or a longer detention of it by himself. Plainly the plaintiff was entitled to recover back from him the money which was paid into his hands less the deduction, if any, which ought to be made for the insurance which the plaintiff had before discovering the fraud.

The defendant contends that it should have been permitted to show, in mitigation of damages, that it had procured an assignment of the mortgage, and that it tendered a discharge of it to the plaintiffs at the trial; but we are of opinion that the ruling

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on this point was correct.* The defendant may hold and use its mortgage in any lawful way, but the plaintiffs ought not to be compelled to receive the discharge of it in mitigation of their damages after the expiration of so long a time. If the mortgage were discharged, it would not, as matter of law, limit their recovery to nominal damages. If there had been no encumbrance, they might long ago have sold the bonds on better terms than can be obtained now. Moreover, the commission of the fraud, if fraud is proved, was a wilful wrong, and the case is analogous to a wilful conversion of property, and an offer to return it in mitigation of damages after its condition has changed and its value has depreciated. *Stickney* v. *Allen*, 10 Gray, 352. *Dahill* v. *Booker*, 140 Mass. 308, 310. *Bigelow Co.* v. *Heintze*, 24 Vroom, 69. *Yale* v. *Saunders*, 16 Vt. 243. *Rutland & Washington Railroad* v. *Middlebury Bank*, 32 Vt. 639. Practically, it might be difficult in this case to measure the amount that should be allowed now on account of a discharge of the mortgage in mitigation of damages, and we are of opinion that we ought not to compel the plaintiffs to accept the tender, or to make an allowance in the assessment of damages as if they had accepted it.

The evidence of J. Plympton was rightly received. The declaration in his case is sufficient to justify a recovery of damages on the theory on which his case was presented to the

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* The bill of exceptions recites:

"The defendant offered to show that at or about the time the prior mortgage became due it took an assignment of that mortgage to itself, and that subsequent thereto it had prepared a valid discharge of said mortgage, which discharge it brought into court and tendered to the plaintiffs; and thereupon the judge ruled as follows: 'The ruling of the court is that the offer of the defendant to show that, since the cause of action accrued to the plaintiffs, it has taken an assignment to itself of the outstanding mortgage, is not competent in mitigation of damages. Secondly, the offer of the defendant to show that after taking the assignment of the mortgage to itself it has discharged, or offers to tender to the plaintiffs in these cases a full discharge of that mortgage which the plaintiffs can record, is not competent in mitigation of damages, and saves the rights of the defendant.' Thereupon a valid discharge of the mortgage was tendered to each of the plaintiffs, which was admitted by the plaintiffs to be sufficient in form and properly executed. The plaintiffs declined to accept the discharge, and the judge excluded the discharge, and ruled that it could not be considered in mitigation of damages; and the defendant excepted."

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jury.* If everything alleged in regard to rescission is stricken out, enough remains upon which to found the verdict. The letter of September 8, 1890, from Barnes to James M. Keith was competent.† It was not only a statement that Davis said he sold bonds through Keith, but it was an assumption that what he said was true. It implied that the information had been communicated in such a way, and under such circumstances, as to be trustworthy, and as against the defendant it was in the nature of an admission that the sale had been made as Davis said it had.

We think that there is no occasion to consider more particularly the questions argued by the defendant. Such of them as

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* The bill of exceptions recites:

"Jeremiah Plympton having died since the first trial, his evidence at the former trial was read, in which he testified as follows: 'I am one of the plaintiffs; had had business with the defendant prior to February, 1890. Have no recollection of ever having seen the defendant's prospectus. I purchased two bonds. Before purchasing, saw the letter of Feb. 6, and the printed advertisement, and read them both. *Q.* What induced you to buy those bonds? *A.* The statement of the president of the company principally.'

"On cross-examination he testified: 'Mr. Keith showed me the location of the land. I, in part, relied upon his representations that the bond was good. I did not know Messrs. Barnes or Fish or any officer of the defendant company, and hardly think I would have taken the bonds without making further inquiries if a stranger had offered them to me with the letter and the advertisement. I bought the bonds of Keith and paid him for them.'

"The testimony of Plympton was admitted subject to the defendant's exception, on the ground that, as Plympton had sold his bonds, this defendant could not be held under this declaration."

In the case of Plympton, under instructions from the judge, the jury returned a verdict of three hundred dollars for the plaintiff.

† The bill of exceptions recites:

"Subject to the defendant's exception, the plaintiffs introduced the following letter, which letter counsel for the plaintiffs cited in his argument to the jury as conclusive proof that Keith acted as the agent of Davis:

"'Minneapolis, Minn., 9/8, 1890. James M. Keith, Esq., Boston, Mass. Dear Sir, — Mr. George W. Davis has paid the last coupon received from your clients, but says he sold through you $32,000 of bonds, interest upon which is $1,120 for six months. We have received coupons to the amount of only $910. Who has the others, and why don't they send them for collection? Coupons received were sent by yourself, Jeremiah Plympton, A. L Plympton, S. H. Brown, Jr., Elizabeth D. Sibley, and Henry A Potter. Yours truly, J. U. Barnes, Pl.'"

James M. Keith was one of the plaintiffs, and through him others of the plaintiffs obtained their bonds which had belonged to Davis.

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are not covered by what we have already said will not be likely to arise at another trial. *Exceptions sustained.*

HOLMES, J. I am unable to agree with the decision reached by a majority of the court on the first point discussed by them. I will not in this place go into any extended discussion of general principles. If I were making the law, I should not hold a man answerable for representations made in the common affairs of life without bad faith in some sense, if no consideration was given for them, although it would be hard to reconcile even that proposition with some of our cases. But the proposition, even if accepted, seems to me not to apply to this case. The proper meaning of the words used by the defendant has been settled by this court already. 159 Mass. 437. The representation was not made in casual talk, but in a business matter, for the very purpose of inducing others to lay out their money on the faith of it. When a man makes such a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and it seems to me one of the first principles of social intercourse that he is bound at his peril to know what that meaning is. In this respect it seems to me that there is no difference between the law of fraud and that of other torts, or of contract or estoppel. If the language of fiction be preferred, a man is conclusively presumed in all parts of the law to contemplate the natural consequences of his act, as well in the conduct of others as in mechanical results. I can see no difference in principle between an invitation by words and an invitation by other acts, such as opening the gates of a railroad crossing, (*Brow* v. *Boston & Albany Railroad*, 157 Mass. 399,) or an intentional gesture, having as its manifest consequence, according to common experience, a start and a fall on the part of the person toward whom it is directed, in either of which cases I suppose no one would say that a defendant could get off by proving that he did not anticipate the natural interpretation of the sign. Of course, if the words used are technical, or have a peculiar meaning in the place where they were used, this can be shown; if by the context, or the subject matter, or the circumstances, the customary meaning of the words is modified, this can

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be shown by proof of the circumstances, the subject matter, and the context; but when none of these things appears, a defendant cannot be heard to say that for some undisclosed reason he had in his mind, and intended to express by the words, something different from what the words appear to mean, and were understood by the plaintiff to mean, and are interpreted by the court to mean, whether the action be in tort or contract.

Neither, in my opinion, are there any peculiar safeguards set up about the action for deceit. That action was given by the common law for any false statement of present facts of which the defendant took the risk, and which was followed by damage. He might take the risk at different points in different cases. A false warranty used to be laid as a deceit in tort for a false and fraudulent representation. Clift, Entries, 932, pl. 40. Liber Placitandi, 40, pl. 54, 55. Y. B. 11 Ed. IV. pl. 10. So even an implied warranty. *Brown* v. *Edgington*, 2 Man. & G. 279. See Y. B. 11 Ed. IV. 6 b; Keilw. 91, pl. 16. Yet it was not necessary to lay the *scienter*, or, if you laid it, to prove it, for the plain reason, as Shaw, C. J. puts it, in substance, that the defendant is answerable for the facts, however honest he may have been. *Norton* v. *Doherty*, 3 Gray, 372, 373. *Schuchardt* v. *Allens*, 1 Wall. 359, 368. *Williamson* v. *Allison*, 2 East, 446. *Gresham* v. *Postan*, 2 C. & P. 540. *Denison* v. *Ralphson*, 1 Vent. 365, 366. In the last century an alternative form in assumpsit was introduced, (*Stuart* v. *Wilkins*, 1 Doug. 18, 21, Lawrence, J., and *Williamson* v. *Allison*, 2 East, 446, 451,) and it may be that now we should require the warranty to be alleged, which has the advantage of telling the defendant more exactly what the case is against him. *Cooper* v. *Landon*, 102 Mass. 58. But there is no doubt about the common law. I am of opinion, as I have stated, that in a case like the present a man takes the risk of the interpretation of his words as it may afterwards be settled by the court.

I am authorized to say that the Chief Justice agrees with the foregoing dissent.

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SUPPLEMENT.

Opinion of the Justices to the House of Representatives.

Without attempting to define the limits of the power of the General Court in Massachusetts to control the right of its inhabitants to make contracts generally, the Justices cannot say that a statute requiring manufacturers to pay the wages of their employees weekly is not one which the General Court has the constitutional power to pass, if it deems it expedient so to do.

The following order was adopted by the House of Representatives on April 15, 1895, and thereupon transmitted to the Justices of the Supreme Judicial Court, who, on May 6, 1895, returned the opinion which is subjoined.

Ordered, that the Justices of the Supreme Judicial Court be required to give their opinion to the House of Representatives upon the following important question of law:

Is it within the constitutional power of the Legislature to extend the application of the present law, relative to the weekly payment of wages by corporations, to private individuals and partnerships, as provided in the bill entitled "An Act relative to the weekly payment of wages," now pending before the General Court?

Ordered, that a copy of said bill be transmitted to said Justices for their information.

The copy of the bill was as follows:

An Act relative to the weekly payment of wages.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

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Section 1. Sections fifty-one to fifty-four, inclusive, of chapter five hundred and eight of the acts of the year eighteen hundred and ninety-four, relative to the weekly payment of wages by corporations, shall apply to any person or partnership engaged in this Commonwealth in any manufacturing business and having more than twenty-five employees. And the word "corporation," as used in said sections, shall include such persons and partnerships.

Section 2. This act shall take effect upon its passage.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, received, on the 20th ultimo, your resolution, a copy of which is annexed, and in reply we respectfully submit the following opinion.

Your question implies that in your opinion the present law relating to the weekly payment of wages by certain corporations to their employees is constitutional, and your inquiry is whether it is within the constitutional power of the Legislature to extend the law to private individuals and to partnerships.

We are not informed of the nature of the doubts which your request implies. It is well known that in some of the States of this country legislation similar to that proposed has been held unconstitutional by the courts, sometimes on the ground that it is partial in its character, but more frequently on the ground that it interferes with what is called the liberty of contract, which, it is said, either as a privilege or as property, is secured to the inhabitants of a State by its Constitution, or by the Constitution of the United States. In some of these decisions a distinction has been suggested or made between the rights of natural persons and the rights of corporations, and such legislation has been deemed valid with respect to corporations whose charters were subject to alteration, amendment, or repeal by the Legislature, or which, being foreign corporations, were permitted to do business in the State under such conditions as the Legislature might impose, while the legislation has been deemed void with respect to natural persons. Some recent decisions on this subject are the following: *Leep* v. *St. Louis, Iron Mountain, &*

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Southern Railway, 58 Ark. 407; *State* v. *Peel Splint Coal Co.* 36 W. Va. 802; *Hancock* v. *Yaden*, 121 Ind. 366; *State* v. *Brown & Sharpe Manuf. Co.* 18 R. I. 11; *Shaffer* v. *Union Mining Co.* 55 Md. 74; *Tilt* v. *People*, Illinois, March 14, 1895.*

The legislative power granted to the General Court by the Constitution of Massachusetts is perhaps more comprehensive than that found in the constitutions of some of the other States. The Constitution of Massachusetts, c. 1, § 1, art. 4, provides as follows: "And further, full power and authority are hereby given and granted to the said General Court, from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof," etc. This provision was taken substantially from the Province Charter. There is not in the Constitution of Massachusetts anything which in terms relates to the freedom or liberty of contract, as there is concerning the liberty of the press. The Constitution declares that "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." And it is also declared that "no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Declaration of Rights, art. 1 and 12. This last declaration was taken from Magna Charta, and in substance it has been incorporated in the 14th Amendment of the Constitution of the United States, in form as follows: "No State shall make or enforce any law which shall abridge the

* See *Ritchie* v. *People*, 155 Ill. 98.

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privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In legal nomenclature, at the time of the adoption of the Constitution of Massachusetts, the right to make a contract for personal services, if it can be regarded either as property or as a liberty or privilege, would perhaps have been regarded as the latter. So far as we are aware, the capacity to make such a contract was not, in the discussions concerning the Constitution, ever spoken of as property, although that capacity may be necessary to the acquisition of property. The statutes existing in England at the time of the adoption of the Constitution, regulating the employment of servants or laborers, were of ancient origin. The modern English statutes concerning the regulation of employment in factories undoubtedly rest on somewhat different political and economical principles from those formerly entertained. In Massachusetts, after the Province became an independent State, and before the adoption of the Constitution, the General Court passed laws regulating minutely the prices of commodities, and in certain respects the prices of labor. Prov. Sts. 1776–77, cc. 14, 46; 5 Prov. Laws (State ed.), 583, 642. It never has been much considered by the courts of Massachusetts how far the provisions of the Declaration of Rights in the Constitution have limited the power of the General Court with respect to such legislation, but it generally has been thought that this power under the Constitution is subject to some substantial limitations.

There never has been at any time in Massachusetts an absolute right in its inhabitants to make all such contracts as they pleased. Some contracts have always been held void at common law, and some contracts valid at common law have been declared void by statute. Married women at common law were under a general disability to make contracts during coverture; and, although they have been recently empowered by the statutes to make contracts as if they were unmarried, still at the present time husband and wife cannot make contracts with each other, and, if the statutes were repealed, the powers of married women to make contracts would be governed by the

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common law. Marriage brokage and *post obit* bonds and covenants in restraint of trade sometimes have been held void. Minors at common law are under a disability to make contracts except for necessaries; and this is said to be for their protection. Our statute of frauds prevents the enforcement in the courts of many kinds of contracts, unless they are shown by a writing, and prohibits the making of certain contracts; and this statute was passed for the protection of persons against fraud and perjury. Seamen sometimes have been regarded as a class of persons who could not be trusted to make their own contracts without supervision, and statutes have been passed making regulations concerning their wages and shipping contracts. U. S. Rev. Sts. §§ 4501–4612. Wages to a certain amount due for personal labor and services have been exempted from attachment, probably on the ground that it was thought that workmen generally need their wages for their support. Usury laws furnish perhaps the best known illustration of the regulation by statute of the price to be paid for the use of a commodity; but the validity of these laws usually has been regarded as an exception to a general rule. The Public Statutes of Massachusetts, Title 12, entitled "Of the regulation of trade in certain cases," show various forms of interference by the Legislature with what may be called the freedom of trade or of contracts concerning the sale of commodities. The regulation of the subject of fire insurance, and the prohibition of the sale of oleomargarine made in imitation of yellow butter, and the requirement that an agreement to make a will must be in writing, are some of the most recent instances in Massachusetts of the prohibition or regulation of contracts by statute. The constitutionality of much of this legislation never has been questioned, and when questioned it generally has been sustained.

The Supreme Court of the United States has recently considered the constitutionality of the act of Congress of June 27, 1890, making it a misdemeanor for an attorney to receive more than ten dollars for prosecuting a claim for a pension, and has decided the statute to be constitutional. In *Frisbie* v. *United States*, 157 U. S. 160, that court say: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet

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such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property." See *Wolcott* v. *Frissell*, 134 Mass. 1.

In *Commonwealth* v. *Hamilton Manuf. Co.* 120 Mass. 383, the court of which we are now the justices decided that the statute of 1874, c. 221, was constitutional. The provision which it was contended was unconstitutional was that "No minor under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm, or corporation in any manufacturing establishment in this Commonwealth more than ten hours in any one day," except in certain cases; and that "in no case shall the hours of labor exceed sixty per week." The decision of the case did not turn upon the fact that the defendant was a corporation of this Commonwealth, organized under St. 1824, c. 44. The court say: "There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this Commonwealth that reference to the decisions is unnecessary."

In *Commonwealth* v. *Perry*, 155 Mass. 117, the statute of 1891, c. 125, § 1, was declared unconstitutional by a majority of the court. The principal ground of the decision is that the statute was an attempt "to compel payment under a contract of the price for good work when only inferior work is done"; and it is said that "the right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law"; and that, if the statute be

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held to permit the hiring of weavers "only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to every one," etc.

The decisions of various courts of this country upon the authority of the Legislature of a State to prescribe rates for transportation by railroad companies, and, in some instances, for the use of elevators, have proceeded on the ground that these were public employments; and it is implied in all or nearly all of these decisions that the Legislature could not constitutionally prescribe the rates of compensation to be paid for services, or for the use of property, in exclusively private employments.

It is manifest, however, from the examples we have given, that the regulation of contracts by statute not amounting to a determination of rates or prices has not been confined to public employments or to business which may be said to be affected with a distinct public interest. The legislation on this subject relates to a great variety of contracts, and has been passed, some of it to promote the public health or the public morals or the public convenience, some of it for the protection of individuals against fraud, and some of it for the protection of classes of individuals against unfair or unconscionable dealing. The considerations which may influence the Legislature to determine what legislation of this character is required by good public policy, or, in the words of the Constitution, what laws are "for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same," are not for us to weigh, except so far as may be necessary to determine whether the legislation proposed is repugnant or contrary to the Constitution. The legislation on similar subjects in Great Britain, and in other foreign countries which have no written constitutions limiting the powers of the Legislature, is not in all respects pertinent to the present inquiry; but, considering the history of legislation in England concerning servants or laborers from the

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earliest times, and the statutes which in modern times have been passed in several foreign countries and in many of the States of this country regulating the employment of laborers in factories, we cannot say, as matter of law, that the legislation proposed is so plainly not wholesome or reasonable that the General Court may not judge it to be for the good and welfare of the Commonwealth. We know of no reason derived from the Constitution of the Commonwealth or of the United States why there must be a distinction made in respect to such legislation between corporations and persons engaged in manufacturing, when both do the same kind of business. The existing statutes on the subject relating to manufacturing corporations we do not regard as having been passed necessarily in amendment of their charters. They relate to all the corporations described, whether there is any power reserved in the Legislature to amend their charters or not, and they do not purport to have been passed for the purpose of restricting the corporate powers of the corporations. Without attempting to define the limits of the power of the General Court in Massachusetts to control the right of its inhabitants to make contracts generally, we cannot say that a statute requiring manufacturers to pay the wages of their employees weekly is not one which the General Court has the constitutional power to pass, if it deems it expedient to do so. We have not examined in detail the provisions of the bill referred to in the inquiry, or considered whether the bill may not need amendment to make its meaning clear; but the question submitted we think should be answered in the affirmative.

WALBRIDGE A. FIELD.
CHARLES ALLEN.
OLIVER WENDELL HOLMES.
MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.
JAMES M. BARKER.

May 6, 1895.

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THE Honorable EBENEZER R. HOAR, a Justice of this Court from the twelfth day of April, 1859, to the tenth day of March, 1869, died at his residence in Concord on the thirty-first day of January, 1895. A meeting of the members of the Bar of the Commonwealth was held in Boston on the ninth day of March, at which resolutions were passed, which were presented to the full court on the same day. Before presenting them, the Attorney General addressed the court as follows:

May it please your Honors, — It is a custom of the bar, venerable and befitting, to attest in some solemn manner its appreciation of the worth of its departed leaders, and to pay its tribute of respect to their memories. Seldom does it happen that this ceremony is more grateful, or its observance more appropriate, than upon the occasion which assembles us to-day. Ebenezer Rockwood Hoar, a member of the bar for fifty-five years, at one time a justice of this court, died on the thirty-first day of January last at the ripe age of seventy-nine years. A dignified and impressive presence, long familiar to the courts of this Commonwealth, is henceforth but an inspiring memory. A place at the bar is vacant, that will not soon be filled.

He died in Concord, where he was born and had always lived. That famous town, rich in New England historical associations no less than in representative New England men, claimed him as one of her illustrious sons. But no town or county can appropriate his fame as a jurist. He belonged to the Commonwealth. His associates in the county of Suffolk, in the resolutions which they have instructed me to present, speak, I am sure, not for themselves alone. The bar of the State shares in the honor which his career has conferred upon our difficult profession.

It often happens, as we know, that the merits of a lawyer are justly appreciated only by his associates at the bar. The standards of the layman are not always accurate. Perhaps the recognition of this fact may account in part for the origin and growth of the custom of observances like this. But, be that as it may, no such necessity constrains us in the present case. It was one of the fortunate facts of his life that the community came to

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know him and to appreciate him as accurately as did his associates at the bar. The reputation of a lawyer is sometimes specious and undeserved. On the other hand, it is not always adequate to his real worth. But Mr. Hoar was one of the few really good lawyers whom everybody knew to be a good lawyer.

Nor are we called upon to pronounce upon his work, that we may seek to preserve his name from the oblivion to which the fleeting memories of great lawyers are proverbially consigned. He has become a part of the imperishable history of the country. This distinction, however, was not achieved at the expense of his professional work. Throughout his life he was loyal to that most jealous and exacting mistress, the law, and served her with the measure of exclusive and singular fidelity which she demands of those who enter her service. The price of such service is often the renunciation of fame; but it was not so in his case. It is not too much to say that the record of the progress of civilization will be incomplete if it omits honorable mention of the name of Ebenezer Rockwood Hoar.

There are some circumstances of a man's life over which he has no volition, but which go far to mark his career. As to these Mr. Hoar was unusually favored. He was descended from the best and purest of Puritan stock. It was also his fortune to grow up in a community which has twice led the march when the bugle call of freedom sounded, — a community to live in which could have been but an inspiration. He was no less fortunate in the time of his career. Entering upon his work at the period in her history when Massachusetts was just emerging from the provincialism of her Colonial days, when the great inventions of modern times were beginning to revolutionize civilization, called to the bar when Lemuel Shaw was laying broad and deep the foundations of the jurisprudence of Massachusetts, he was brought in touch with all that succession of momentous events which have made the last half-century the golden age of history.

He was called to the bar in 1839. His firm grasp of the law, his strong traits of character, his impartial sense of justice, early marked him as especially adapted to a judicial career. Ten years from the time of his admission he was appointed one of

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the judges of the Court of Common Pleas. His love of professional work, however, was still strong; and after a brief time he resigned his office to take his place once more at the bar. But again the Commonwealth required his services, and from 1859 to 1869 he was one of the justices of this court. It is not to be denied that judicial work was to his liking; but it is also true that his love for the contests of the bar always finally predominated, as is shown by the fact, I believe without precedent, that he twice resigned a commission as judge; and at a later period of his life declined the offer of the high position of Chief Justice of Massachusetts.

Of his work here it is simple justice to say that he did his full share in maintaining the commanding place that the Supreme Judicial Court of this Commonwealth has attained and deserves among the tribunals of English speaking people. But he was not destined to end his life upon the bench. That which to most of us is justly regarded as a fitting climax to an honorable and useful life was for him but the beginning of his career. He was called from the bench to participate in the affairs of the nation at that critical and important period when the wreckage and demoralization of the civil war were being cleared away to make room for the greater America in which we now live. In whatever public station to which he was called, he acquitted himself with honor to himself and credit to his Commonwealth. Posterity particularly will remember with gratitude his work as one of the joint high commission which negotiated the Treaty of Washington, — a treaty which in its results was a sure harbinger that in the progress of civilization arbitration is to take the place of war.

That he was not always popular with his associates is to be conceded. He was not pliable. He could not be handled, and he would not be used. He met with reverses in his political career which would have disheartened a man of weaker fibre. But, as we now look at it, he was usually right; and what perhaps is no less satisfactory, his career has demonstrated that reverses are not always disasters, and that the road to the lasting esteem of men is to be found in fearless devotion to convictions, even in spite of apparent defeat.

But this at least may be said, and perhaps it is the most

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characteristic thing that can be said of him. Under all circumstances, and above all things else, he was a typical son of Massachusetts. He was bone of her bone and flesh of her flesh. Whatever she has deserved was his rightful inheritance. It is not too much to say that the very elements of character and temperament, (if this expression may be applied to a Commonwealth,) which have given Massachusetts her position in history, were to be found in a marked degree in him. Cultured and refined, yet intensely democratic; fearless, but just; an unforgiving foe of sham, trickery, and injustice; absolutely uncompromising, preferring the call of duty to the approval of men; a sturdy fighter; sometimes hated, but always respected; — if these characteristics describe Massachusetts in her relations to the great family of States, they are no less descriptive of Mr. Hoar.

If such a man occasionally excites enmity, it is not necessarily to his discredit. The world has little use for a man of affairs who is without enemies. But such a man also attracts troops of friends whom he binds to himself with hooks of steel. Especially is this true when it happens, as in the case of Mr. Hoar, that the softening influence of age discovers traits of character which the aggressiveness of manhood had obscured. As, in later years, he laid aside from time to time his armor of battle, we came to know what those who enjoyed his intimacy had always appreciated,— that underneath his rugged exterior was a sweetness of disposition, a rare sense of humor, a bubbling well-spring of human nature, an unostentatious charity, which made him best beloved by those who knew him best.

I have alluded briefly to the character of his public service. But it is to a still later period of his life that we who were his associates at the bar, as well as your honors, I apprehend, turn after all with the most satisfaction. It was when, putting off the robes of office, he returned again to his place at the bar. For the last twenty years he has stood among us, a conspicuous example of the proposition we maintain, that there is no more honorable or useful position for a lawyer than at the bar. It is as a simple and untitled practitioner, trusted by his clients as few men are, respected by the court as we all might wish we deserved to be, illuminating by the character of his work the

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profession of which we are so justly proud, that he will be most loyally and gratefully remembered by his professional associates.

Though we deplore his loss, the sentiment of this occasion is not grief at his death, but rather gratification that he lived. The long day of his life was rounded out, and no clouds obscured the golden sunset. Death in the course of nature comes to all. Sooner or later, though we may know not when, the harvester will claim us for his own. We neither fear nor welcome his coming; but we comfort ourselves with the hope that it will not be so prematurely that the wound of laceration shall bleed; nor yet that we shall be left upon the branch alone, shrivelled and shrunken; but rather, like our honored associate, that we shall drop from the tree of life in the golden autumn, like fruit fully ripened, leaving no scar.

The Attorney General then presented the following resolutions:

Resolved, That, whereas the Honorable EBENEZER ROCKWOOD HOAR, formerly Associate Justice of the Supreme Judicial Court, died at his home in Concord, Massachusetts, on the 31st day of January, in the year 1895, in the seventy-ninth year of his age, this Bar does now put on record the following memorial of its venerable and distinguished brother.

He was admitted to practice fifty-six years ago, and served the law at the bar and on the bench for more than half a century. He was a member of the Court of Common Pleas from 1849 to 1853, and of the Supreme Judicial Court from 1859 to 1869. He was Attorney General of the United States for more than a year in the first term of President Grant, and discharged the duties of that high office with conspicuous ability. In 1871 he rendered the most distinguished public service of his life as a member, and a most influential member, of the commission which settled controversies, new and old, between this country and Great Britain by the Treaty of Washington. In 1872 and 1873 he was a member of the House of Representatives of the United States, and in that office again served the law with great assiduity, ability, and success as a member of the sub-committee of the committee of the House appointed to revise the work of the

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revisers of the Public Statutes of the United States. The rest of his active life was spent in the practice of the law.

In all his professional life, whether on the bench or at the bar, he proved himself an able, learned, brave, upright, strong man, — strong in perception and understanding, strong in character, strong in conviction and resolution, strong in an unfailing and unclouded sense of duty.

He was conspicuously marked by that mental intrepidity which comes of clear sight, steady temper, and strenuous purpose, — by that union of dauntless courage and stubborn conscience for which majorities have no terrors.

He was an inveterate hater and indefatigable foe of imposture in all forms and under all conditions.

He was a Massachusetts man to the bone; thoroughly knowing her history and thoroughly comprehending her institutions; punctual in all his duties as one of her citizens; proud of her achievements, devoted to her welfare, her unflinching champion against all comers in all causes.

He loved literature. He read the best and with the best appreciation, and remembered with marvellous tenacity what he read. He was familiar with the choicest English authors, old and new. The English Bible he knew almost by heart. He did not allow his reading in the classics to cease with his college course, but drew from them ever fresh enjoyment to the end of his life.

He loved and practised plainness of speech and dress and deportment, as expressions of that directness which so strongly marked his thought and conduct.

He was the best of company; his talk rich in reminiscences and anecdote and happy quotation, bright with flashes of the keenest wit, and warm with genuine enjoyment of social intercourse.

He was a man of nobility of character, frank in all his dealings, magnanimous, sympathetic, loyal in his friendships, generous, and compassionate. He stood well this supreme test, — his townsmen and neighbors trusted and loved him.

He died full of honors; an American citizen of the truest type, recognized by his fellow citizens on all hands as one of the most worthily distinguished of his country's sons, a bulwark of her good name, and an ornament of her history.

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Chief Justice Field responded as follows:

Brethren of the Bar, — The court receives the resolutions of the bar concerning Judge Hoar with the same appreciation of his character and of his professional and public life as the bar have expressed. In his death we have lost not only a very distinguished lawyer, but a man of unique character, who has had great influence upon the whole people of the Commonwealth. It is now twenty-six years since he resigned the office of Associate Justice of this court, and all who were then the justices, except one, are dead. A majority of the present members of the bar probably never tried cases before him as judge, and they knew him best as a lawyer actually engaged in practice. He was born in 1816, graduated from Harvard College in 1835, and was admitted to the bar in 1839. As early as 1846 he was a member of the State Senate, and in 1849 he was appointed a justice of the Court of Common Pleas. While a comparatively young man, his commanding abilities and his fitness for his profession and for public affairs were recognized. From the first he was a man of marked characteristics and decided opinions, and he displayed throughout his life a constant sense of public and private duty.

His term of service on this court was not quite ten years long. When he came upon the court, the political agitations concerning the extension of slavery were fast tending toward war; and when he left the bench, the Rebellion had been successfully put down and slavery abolished, and he resigned to take part in the peaceful settlement of the many difficult questions which arose from the war. When appointed to the court, he had attained such distinction as to be reckoned among the leaders of the bar, and he added greatly to his reputation while on the bench. He was pre-eminent for his love of justice, the quickness and keenness of his perceptions, his extraordinary power of analysis, his sound and strong judgment, his absolute moral courage, and a style so clear and exact that his meaning could not be mistaken. He was very rapid in the performance of work, and perhaps sometimes showed the impatience natural to very quick minds at any delay or indirection in the conduct of a cause, and he always had a deep-seated dislike for sophistries of all sorts. The incisiveness of his language was apt to go to the very marrow of any con-

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troversy, and no jury ever left their seats where he presided without having plainly and forcibly presented to them the exact issues to be determined. In the administration of the office of Attorney General of the United States, he took exclusive charge of the political business of the office, and he had to deal with many matters of grave importance. Our relations with Great Britain, especially, were in an unsatisfactory condition, and although the burden of the negotiations belonged, under the President, to the Secretary of State, yet Judge Hoar strongly supported the Secretary. It was in consequence of this as well as of the confidence which the President had in his character, ability, and good judgment, that he was appointed one of the commissioners to negotiate the Treaty of Washington.

Matters of domestic as well as of foreign policy were often made cabinet questions while he was Attorney General, and his opinions were always unequivocal. During his term of office nine judges of the Circuit Court and two justices of the Supreme Court of the United States were appointed, and he personally argued the important cases before that court in which the United States were concerned. The thorough, able, and sagacious manner in which he met all the responsibilities of his office was acknowledged by all.

After he returned to Massachusetts, in 1870, he was known as a lawyer and a public-spirited citizen, interested in everything that concerned the welfare of the Commonwealth. He occasionally tried cases before a jury, but most of his practice was before the court. He either lacked or disdained the art of influencing men by flattery, and he was perhaps of too unaccommodating a temperament to humor any man's prejudices. His arguments were like his opinions, — not long, very clear, remarkably strong in analysis, and persuasive in their sound sense. He used great directness and simplicity of statement, and he relied on his wit to point or enliven the argument. Although he always took an active interest in politics, the only elective political offices he ever held were those of Senator in the State Senate for one term, of Representative in Congress for one term, and of Presidential Elector.

But he was interested not only in law and politics; he was interested in everything human, and was especially devoted to

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the welfare of his college and his church. I think he must be regarded, on the whole, as a conservative man in his general character; and he was especially anxious to preserve the best institutions and the best habits of New England life, and to make the most of them.

He had all the law practice he wanted; it was of the best kind, and took as much of his time as he wished to give to his profession. He would not, I think, have enjoyed an overwhelmingly large practice, for he wished time for conference with his friends, for meditating upon many things, for enjoying many things, and for reading what he chose. He was famous for his wit, and sayings of his will be quoted for generations. He was emphatically a New Englander, and his whole conversation and manner showed the soil from which he sprang. He had the shrewd judgment of the typical New Englander, and the faculty of characterizing a man or a cause by an epithet or a phrase in a strictly Yankee way. It was the nimbleness of his wit and the singular charm of his conversation, as well as the sincerity of his character, which endeared him so much to that bright set of literary men whose companion he was. In a running conversation his wit appeared constantly. It was unpremeditated, sudden, and every way his own. He kept no memoranda of fine sayings, but he had a remarkable memory for anything striking or felicitous in speech which he had ever heard or read, and he had read much of the best English literature. He was an unflinching advocate of any cause which he had much at heart, and he could hardly forgive any persons who he thought deliberately acted in violation of their own sense of right. He grew more tolerant as he grew older; but he still always preserved fidelity to his convictions, cost what it might. It was only on acquaintance that one could know how tender-hearted he was, how generous he was, how considerate he was, to those whom he thought deserving. He had the habit of repressing any strong exhibition of feeling, and he took great satisfaction in doing good by stealth. He was a delightful companion to those who knew him well, and his personality was so distinct and pronounced that no one can be found to take exactly his place in our profession. He has left behind him an example of disinterestedness, sincerity, courage, noble-

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ness of purpose, and strenuous endeavor to make the world better worth living in, which it is easy to praise, but not easy to imitate.

The resolutions with a memorandum of these proceedings will be entered on the records of the court.

The court then adjourned.

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INDEX.

ABANDONMENT.

See EVIDENCE, 8–10.

ABATEMENT.

An answer or plea in abatement cannot be filed after an answer on the merits; the latter waives all matters in abatement. *Craig Silver Co.* v. *Smith*, 262.

See TRUSTEE PROCESS.

ACCOUNT.

See HUSBAND AND WIFE, 4; MECHANIC'S LIEN, 1.

ACTION.

1. An equitable assignment of a mortgage does not entitle the assignee to maintain an action in his own name for the conversion of the property mortgaged. *Baker* v. *Seavey*, 522.
2. A second mortgagee who is not in actual possession of the property covered by his mortgage, and is not entitled to the immediate possession thereof, cannot maintain an action for its conversion. *Ibid.*
3. In an action upon a poor debtor's recognizance against A. as principal and B. as surety, it appeared that, subsequently to the arrest of A. on the original execution, the plaintiff caused the arrest of C., another of the judgment debtors named in the original judgment, on an alias execution, and C. was committed to jail, from which he was discharged under the statute by order of the plaintiff after C. had claimed support as a pauper. *Held*, that the action would lie. *Kellogg* v. *Underwood*, 214.
4. The charter of a city created a board of street commissioners, and in terms took away the power of the city to superintend and direct the board in detail. By an ordinance of the city the street commissioners were to perform the duties and to have the powers of road superintendents and

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surveyors of highways, and were to appoint a superintendent and an assistant superintendent, who should be under their direction and control. A person was injured, through the alleged negligence of the assistant superintendent of streets, by the falling upon him of a bank while digging gravel from the city's land to be used in repairing one of its streets. *Held*, that he could not maintain an action against the city for his injury. *McCann* v. *Waltham*, 344.

5. An action cannot be maintained against the owner of a building, in which is a freight elevator for the use of tenants which the owner retains in his control and keeps in repair, for personal injuries occasioned to a boy fifteen years of age in the employ of a tenant by falling through an open space at the second floor of the building between the platform of the elevator and the rear wall of the building, if the plaintiff's rights on the elevator were only those of his employer, and the defendant owed the plaintiff no duty to change the construction and arrangement of the elevator, and there is no evidence to show that the plaintiff was in the exercise of due care. *Freeman* v. *Hunnewell*, 210.

6. An action cannot be maintained against a street railway corporation for personal injuries occasioned to a passenger in its car, on the ground that it ought to have avoided a runaway horse and herdic attached which ran into it and did the damage as it was making a sharp turn into a street on the opposite side from the street down which the carriage came, and the driver of the car was stopping for passengers on his side; it being conjecture whether he knew that the carriage was coming. *Hamilton* v. *West End Street Railway*, 199.

7. A boy fourteen years old went upon premises used as a saw-house and box factory, solely for his own amusement, and, while assisting a workman who was sawing slabs with a circular saw, the upper part of which was exposed, by taking, in accordance with the latter's directions, the pieces of wood from the saw as they were cut and throwing them upon the floor or into a wagon, was injured by coming in contact with the saw in reaching across it to get a piece of wood. He had been accustomed to visit the premises, and to amuse himself by riding in the wagons and by assisting the workmen, in the presence of the owner, who had himself on one or two occasions directed him to load some boxes; and shortly before the accident happened the owner saw him helping to load slabs into a wagon to be taken to the saw-house. *Held*, in an action against the owner for his injury, that he was only a licensee and volunteer, and the defendant owed him no duty except to abstain from injuring him wantonly; and that the action could not be maintained. *Shea* v. *Gurney*, 184.

See ADMINISTRATOR, 1; ASSAULT AND BATTERY; BOSTON, 3; CONTRACT, 1; CORPORATION, 1; DAMAGES; DECLARATION; ESTOPPEL, 3; EXCEPTIONS, 7, 8, 10; GENERAL AVERAGE, 1; HIGHWAY; HUSBAND AND WIFE, 2; INFANT; INSOLVENT DEBTOR, 7; JUDGMENT; JURISDICTION; MASTER AND SERVANT, 1, 3, 4, 5, 9, 11; NEGLIGENCE, 1, 3; PARTNERSHIP, 1; PASSENGER, 2; POOR DEBTOR, 2, 3; PROMISSORY NOTE, 1, 2; RECEIVER, 1; SUMMARY PROCESS FOR RECOVERY OF LAND; TOWN; TROVER; TRUSTEE PROCESS.

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ADMINISTRATOR.

1. If A. and B. execute a contract, by the terms of which A. is to deliver goods manufactured by him to B., who is to make certain advances of money, and A. dies before the contract is fully performed, and his estate is insolvent, and the administrator of his estate makes an agreement with B. to deliver the goods on hand pursuant to the contract with A., and B. is to account to and pay the administrator for the goods so delivered without regard to or giving any credit for the advances made by B. previously to A.'s death, the administrator may maintain an action in his individual capacity against B. for the goods delivered under the agreement, and B. is not entitled to set off a claim against A.'s estate for advances made to him under the contract. *Seaver* v. *Weston*, 202.
2. If the wife of a payee of a promissory note in good faith indorses the note in his name without his authority, he being unconscious by reason of illness, and the note, having been indorsed also by a third person for the payee's accommodation and at the wife's request, is discounted, and its proceeds go into his estate before his death, and the maker pays the note at maturity in ignorance of the nature of the indorsement, the administrator of the payee's estate may ratify the act of the wife in so indorsing the note. *Ibid.*

See ESTATES OF PERSONS DECEASED, 1–3; INTERPLEADER; LIMITATIONS, STATUTE OF; NAME, 2; SALE, 5.

ADMIRALTY.

See EVIDENCE, 33; GENERAL AVERAGE.

ADMISSIONS.

See EVIDENCE, 3; RECEIVER, 1; TRIAL, 5–7.

ADULTERY.

1. An indictment charging the defendant with the crime of adultery on July 1, 1894, "and on divers other days and times between that day" and June 5, 1894, is bad, because it charges the offence with a *continuando*, and also because it is objectionable for duplicity; and the allegation of continuance, being sufficient in form, cannot be rejected as surplusage. *Commonwealth* v. *Fuller*, 499.
2. Where it appeared that, at the trial in the Superior Court of an indictment for adultery, evidence was introduced of a succession of acts of familiarity between the defendant and his paramour extending over more than a year, that the presiding judge declined to compel the prosecution, either at the beginning of the trial or at the close of its testimony, to elect on which occasion it would rely, that at the close of all the testimony it elected to rely on one of the earliest occasions of which there was any evi-

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dence, and that the judge treated the evidence relating to subsequent occasions as indicative of an adulterous disposition, without affording an opportunity to the defendant to object to it as too remote, this court deemed it proper to say that the trial was conducted irregularly, and without due regard to the rights of the defendant. *Commonwealth* v. *Fuller*, 499.

ADVERSE POSSESSION.

See WAY, 1-7.

AGENT.

See ACTION, 4; ASSAULT AND BATTERY; CHATTEL MORTGAGE, 2; CITY, 1; CONTRACT, 3; CORPORATION, 2, 3; DAMAGES, 3; EVIDENCE, 1; PASSENGER, 1; TENDER; TOWN, 1; TRESPASS; TRIAL, 3.

AMENDMENT.

The Superior Court has power to allow an amendment changing a petition under Pub. Sts. c. 52, § 16, for damage to property by reason of any raising, lowering, or other act done for the purpose of repairing a way, into a petition under Pub. Sts. c. 49, § 79, for the assessment of damages occasioned by the laying out of the way, if, when the proceedings in the Superior Court were begun, the petitioner had the right to the latter remedy, and if the work relied upon in support of the amended petition was the cause of action relied upon in the petition originally filed. *Gray* v. *Everett*, 77.

See EXECUTION, 7.

ANIMALS.

See EVIDENCE, 23; LIBEL; LIVERY STABLE.

ANSWER.

Even if an answer may be regarded as sufficient under St. 1883, c. 223, § 14, the defendant cannot avail himself thereof, if the facts offered in evidence would not, in view of the construction given by the court to the contract in question, entitle the defendant "in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action." *Sirk* v. *Ela*, 394.

See ABATEMENT; DEMURRER; ESTATES OF PERSONS DECEASED, 1.

APPEAL.

See COSTS; EQUITY, 8, 10; INSOLVENT DEBTOR, 6; SALE, 4; SUPERIOR COURT, 1.

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APPROPRIATION OF PAYMENTS.

See HUSBAND AND WIFE, 4.

APPURTENANCE.

See EQUITY, 2; WAY, 9.

ARREST.

See ACTION, 3; CONTRACT, 1; EXECUTION, 2; MALICIOUS PROSECUTION, 3; POOR DEBTOR, 2.

ASSAULT AND BATTERY.

If acts of an agent of a mortgagor of personal property have the effect, under St. 1888, c. 388, to discharge the lien of the mortgage, the mortgagor may maintain an action against the mortgagee for an assault and battery committed by his servants in subsequently taking the property by force from the possession of the mortgagor. *Schayer* v. *Commonwealth Loan Co.* 322.

ASSESSMENT.

See INTERPLEADER; SEWER.

ASSIGNMENT.

See ACTION, 1; INSOLVENT DEBTOR, 2–8; RECEIVER, 2; SPECIFIC PERFORMANCE.

ATTACHMENT.

The attorney of an attaching creditor has authority to release the attachment, and a paper addressed to the register of deeds reciting that the attachment is dissolved, and requesting that such fact be noted on the record of attachments, signed by the attorney, and delivered to the debtor's attorney for the purpose of dissolving the attachment, has the effect to dissolve it at once, and before the entry is made on the record. *Marble* v. *Jamesville Manuf. Co.* 171.

See ESTOPPEL, 4; INSOLVENT DEBTOR, 1, 5; TROVER, 1, 4; WAIVER.

ATTORNEY AND CLIENT.

See ATTACHMENT; MALICIOUS PROSECUTION, 3; PARTNERSHIP, 2; TRIAL, 8.

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AUCTION.

The price of goods obtained at a sale by auction is competent evidence on the question of value. *Baker* v. *Seavey*, 522.

BAIL.

See VERDICT, 2.

BENEFICIARY ASSOCIATION.

See INTERPLEADER.

BETTERMENTS.

See EVIDENCE, 19, 20.

BOARD OF HEALTH.

See DRAIN, 1.

BOARD OF POLICE.

See INTOXICATING LIQUORS, 1, 2.

BOND.

See JURISDICTION.

BOSTON.

1. The power of the board of aldermen of the city of Boston as county commissioners to fix the salaries of the officers of the jail of the county of Suffolk is not taken away by St. 1885, c. 266. *Hibbard* v. *County of Suffolk*, 34.
2. *It seems*, that a regulation of the board of aldermen of the city of Boston as county commissioners, fixing the salaries of the officers of the jail of the county of Suffolk, need not be presented to the mayor for his approval, under St. 1885, c. 266, § 10. *Ibid.*
3. Whether an action for salary due an officer of the jail of the county of Suffolk should not be brought against the city of Boston, instead of the county, *quære*. *Ibid.*

See JURISDICTION; MARRIAGE, 2, 3.

BREAKING AND ENTERING.

See INDICTMENT, 2.

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BRIBERY.

See CONSPIRACY; EVIDENCE, 26–29.

BUILDINGS.

See ACTION, 5; CITY, 2; MASTER AND SERVANT, 10; MECHANIC'S LIEN; RESTRICTION; SALE, 3, 4; TAX, 1.

BURDEN OF PROOF.

See DECEIT, 1; PROMISSORY NOTE, 3.

BUTTER.

See OLEOMARGARINE.

BY-LAW.

See STREET RAILWAY, 2.

CARRIER.

See NEGLIGENCE, 2; PASSENGER.

CEMETERY.

See TRUST AND TRUSTEE, 2.

CERTIFICATE.

See CORPORATION, 1; HUSBAND AND WIFE, 1, 2; INTERPLEADER; POOR DEBTOR, 1.

CERTIORARI.

See INTOXICATING LIQUORS, 2; RAILROAD COMMISSIONERS.

CHARITY.

See PUBLIC CHARITY; TRUST AND TRUSTEE, 3.

CHARTER-PARTY.

See GENERAL AVERAGE, 2.

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CHATTEL MORTGAGE.

1. A mortgage of personal property given to a corporation contained the condition that, if the mortgagor should save the mortgagee harmless "on account of any and all indorsements upon my notes and acceptances, and shall also pay all and any sums of money advanced to me by said company or paid by it on my account, and all sums I may be indebted to it for goods purchased by me of it, within one year from this date," the mortgage should be void. *Held*, that the words "within one year from this date" should not be confined to the words "goods purchased by me of it," immediately preceding, but should be read as applying to all the transactions mentioned. *Usher* v. *Raymond Skate Co.* 1.
2. The fact that a corporation has taken a mortgage of personal property to secure it for its indorsements of the mortgagor's promissory notes within a year from the date of the mortgage, is no evidence of authority on the part of its treasurer, after the year has expired, to indorse in the name of the corporation an accommodation note made by the mortgagor, for the indorsement of which the corporation is not secured. *Ibid.*

See ACTION, 1, 2; ASSAULT AND BATTERY; ESTOPPEL, 4; EVIDENCE, 24; MORTGAGE; PURCHASER WITHOUT NOTICE; SALE, 4; TENDER; TROVER, 3, 4.

CHILD.

See DEVISE AND LEGACY, 3–5; INFANT; PARENT AND CHILD.

CITY.

1. An officer of a city, who is not authorized to contract for the city, has no authority to ratify in its behalf. *Boston Electric Co.* v. *Cambridge*, 64.
2. The acceptance and use of a building by a city does not bind it to pay for extra unauthorized work done upon it, although the same is beneficial. *Ibid.*
3. Although the St. 1893, c. 417, § 147, which requires the clerk of a city to cause notice of the annual election for the choice of city officers to be printed in one or more newspapers published in that city, and to be posted in the office of the city clerk, does not expressly require a formal return of the publication of notice, yet if the clerk makes a return that notice of the election has been posted by him in the city clerk's office, but says nothing about publication in the newspapers, he is not precluded from afterward testifying that the notice has been published in the newspapers, nor from reading the publications therefrom. *Commonwealth* v. *Smith*, 411.

See ACTION, 4; BOSTON; CONSTITUTIONAL LAW, 1; CONTRACT, 3; EMINENT DOMAIN; EVIDENCE, 1, 18, 22, 26–29; HIGHWAY, 3–5; NEGLIGENCE, 1; PUBLIC CHARITY, 5, 6; STREET RAILWAY; TAX, 2; TOWN, 2; TRESPASS; WAY, 7.

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CLERK OF COURT.

See TRIAL, 8.

CODICIL.

See DEVISE AND LEGACY, 4.

COLLATERAL SECURITY.

See PROMISSORY NOTE, 3.

COMMISSIONERS.

See GRADE CROSSING, 2, 3; RAILROAD COMMISSIONERS.

COMMISSIONS.

See DAMAGES, 3.

COMPLAINT.

See ELECTIONS; ESTOPPEL, 2; EVIDENCE, 25; INTOXICATING LIQUORS, 5; MALICIOUS PROSECUTION; TRIAL, 5–7.

COMPOSITION WITH CREDITORS.

See INSOLVENT DEBTOR, 6.

CONDITION.

See CHATTEL MORTGAGE, 1; EXECUTION, 5; INTOXICATING LIQUORS, 1; LANDLORD AND TENANT; PARTITION; PROMISSORY NOTE, 3; SALE.

CONFESSION.

At the trial of a criminal case it appeared that the defendant had a conversation at the police station with the chief of police, who, before testifying as to the conversation, testified that no inducement or promise was held out to the defendant and no threats were made, and that the defendant said what he did freely and voluntarily; and the exceptions recited that "full and appropriate instructions were given to the jury." *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Sheehan*, 170.

CONFLICT OF LAWS.

See FOREIGN LAW; TRUSTEE PROCESS; WILL.

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CONSIDERATION.

See CONTRACT, 2; DECEIT, 2; PROMISSORY NOTE, 2; PUBLIC CHARITY, 3, 4.

CONSPIRACY.

Certain persons were indicted for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof for the purpose of influencing their action on the granting of the licenses. *Held*, on the evidence, that they were properly convicted. *Commonwealth* v. *Smith*, 411.

See EVIDENCE, 26–29.

CONSTITUTIONAL LAW.

1. The defendant in an information in the nature of a *quo warranto* brought to try his title to the office of president of the common council of a city has no constitutional right to a trial by jury. *Attorney General* v. *Sullivan*, 446.
2. Without attempting to define the limits of the power of the General Court in Massachusetts to control the right of its inhabitants to make contracts generally, the Justices cannot say that a statute requiring manufacturers to pay the wages of their employees weekly is not one which the General Court has the constitutional power to pass, if it deems it expedient so to do. *Opinion of the Justices*, 589.

See OLEOMARGARINE; WITNESS, 1.

CONTINGENT INTERESTS.

See DEVISE AND LEGACY, 4, 5; EQUITY, 1; REMAINDER.

CONTINUANCE.

See POOR DEBTOR, 1, 4.

CONTRACT.

I. *Making.*

1. A., an inhabitant of another State, committed an offence here, and was arrested. He retained B., an attorney at law, and telegraphed to C. as follows: "Telegraph at once four hundred dollars to B., my attorney. . . . Am in trouble. Don't fail." C. thereupon sent the money to B., who then recognized as surety for A., and obtained his release from arrest. Afterwards a *nolle prosequi* was entered by reason of A.'s insanity. *Held*, that there was no contract between C. and B. upon which to found an action for the recovery of the money. *Atwell* v. *Jenkins*, 362.

See ADMINISTRATOR, 1; CORPORATION, 1; INSURANCE, 2; TOWN, 1.

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II. *Consideration.*

2. If A. has refused or hesitated to perform an agreement with B. and is requested so to do by C., who will derive a benefit from such performance and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise. *Abbott* v. *Doane*, 433.

See EVIDENCE, 7; PROMISSORY NOTE, 2; WILL.

III. *Validity.*

3. A city council by vote authorized its committee on public property to contract "for the erection" of a school building in accordance with the plans and specifications of an architect, the total cost of the building not to exceed a sum named. *Held*, that the committee, having made a single contract with A. for the erection of the whole building, exhausted its authority under the vote, and, in the absence of any further authority conferred upon it, could not bind the city by a contract with B. to furnish electrical appliances for the building not contained in the specifications referred to in the vote. *Boston Electric Co.* v. *Cambridge*, 64.

See CONSTITUTIONAL LAW, 2; DRAIN, 5; INSURANCE; INTERPLEADER.

IV. *Construction.*

4. The owner of certain machines for sewing buttons let them to another under a written instrument, by the terms of which the lessee agreed to keep an account of the number of buttons sewed, and to pay for the use of the machines at the rate of twelve cents a thousand. The instrument then provided that, if the lessee failed to keep and render such an account, the lessor might at his option either employ a person to keep the account, "or the lessor may, if he prefers, charge said lessee, in lieu of said twelve cents per thousand, the sum of five dollars per day for each of said machines while and so long as said lessee shall fail or neglect to render accounts of the number of buttons as above provided, and in either case said lessee hereby agrees to pay the reasonable compensation of such person employed as above specified, or to pay to the lessor the full price per day for said machines, as above agreed." *Held*, in an action upon the instrument, that the provision for payment at the rate of five dollars a day was not a penalty, but such rate was the estimated equivalent of what would be due by account for the time when the lessee failed to keep an account; and that judgment was to be entered upon the basis of such rate. *Standard Button Fastening Co.* v. *Breed*, 10.

5. At the trial of an action of contract to recover a sum of money placed in the hands of E., the defendant, to be applied by him, as the agent of S., the plaintiff, upon the purchase of certain premises, it appeared that E. signed an agreement acknowledging the receipt of the money of S., and stating that he agreed to recommend the sale to S. of the premises, and further reciting, "It is understood that if the sale is not completed

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within one month, I shall return said money, and it is understood that I do not bind myself, or attempt to bind any parties, to the completion of said transaction." *Held*, that the agreement must be construed as meaning if the sale was not completed within one month for any cause by either party; that the tender by W., the owner of the premises, within thirty days after the date of the agreement of a deed of the premises to the agent of S. did not complete the sale; and that evidence offered by the defendant to show what took place prior to, at the time of, and subsequent to the making of the agreement was rightly rejected, as it tended to vary and affect the written contract. *Sirk* v. *Ela*, 394.

See ANSWER; CHATTEL MORTGAGE, 1; EQUITY, 4, 9; GENERAL AVERAGE, 2; MECHANIC'S LIEN, 2; NEGLIGENCE, 1; PARTNERSHIP, 2; POOR DEBTOR, 5; PURCHASER WITHOUT NOTICE; SPECIFIC PERFORMANCE; TRESPASS; WAY, 9.

V. *Performance and Breach.*

6. A paper writing signed by A. recited a sale of land by him to B., and a receipt of part payment in cash and an agreement to give two promissory notes for the balance, and contained an express covenant to convey the land to B. by a good and sufficient deed on payment of the notes. It also provided that, if B. should fail to make the payments, A. might consider the sale void so far as the agreement to convey land to B. was concerned, and might sell the land, giving notice to B. of the time and place of sale, and apply the proceeds in part payment of the notes. The notes were given in accordance with the agreement, and were of even date therewith, and the paper and the notes were parts of the same transaction. *Held*, in an action by A. against B. on the notes, that, in addition to the express covenant to convey the land to B. on his making the payments, there was an implied covenant to hold the land under the contract in readiness to be conveyed at the appointed time; and that a conveyance of the land before the maturity of the first note, which put it out of the power of A. to make a good title to B., was a breach of the contract which justified B. in rescinding it. *Held, also*, that a letter written by B. to the bank where the note was left for collection, stating that A. had failed to perform certain promises made when the note was given, and that until he did the things promised, "I do not feel like paying anything more on the land," was not a waiver of B.'s right to rescind the contract or to defend on the ground of A.'s breach of it; it not appearing that B. then knew what A. had done, nor that he intended to waive any rights, nor that A. took any action in reliance upon the letter. *Fort Payne Coal & Iron Co.* v. *Webster*, 134.

See DAMAGES; EQUITY, 5, 6; EVIDENCE, 15; INJUNCTION, 1; PAYMENT; SALE, 1, 2; WAIVER.

VI. *Rescission.*

7. If a person conveys property to another under an agreement, the terms of which are subsequently broken by the latter, and the former has en-

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joyed the benefit arising from the transaction for a period of several months, and the parties cannot be restored to their original positions, the former cannot rescind the transaction and recover the value of the property conveyed, but can only recover damages resulting from the breach of the agreement. *Marston* v. *Singapore Rattan Co.* 296.

8. If the provisions in a will in favor of the testator's wife are not intended to be a substitute for her rights under an ante-nuptial agreement, she is not, by accepting the provisions of the will, precluded from claiming also under the agreement. *Taft* v. *Taft*, 467.

See CONTRACT, 6; DECEIT, 2; HUSBAND AND WIFE, 2; INSANITY.

CONTRACTOR.

See EVIDENCE, 18; INFANT, 2; NEGLIGENCE, 1.

CONTRIBUTION.

See GENERAL AVERAGE.

CONTRIBUTORY NEGLIGENCE.

See ACTION, 5, 6; EMPLOYERS' LIABILITY ACT, 6; EVIDENCE, 12, 13; GRADE CROSSING, 1; HIGHWAY, 5; MASTER AND SERVANT, 1, 4, 5, 8–11; NEGLIGENCE, 4–8; PARENT AND CHILD; PASSENGER, 3; WAY, 8.

CONVERSION.

See ACTION, 1, 2; DOWER; INSOLVENT DEBTOR, 7; TROVER.

CORPORATION.

1. If a corporation organized in West Virginia, but having its usual place of business in Connecticut, enters into a contract for the sale of certain of its shares, and also of goods manufactured by it, and delivers a part of the shares and also certain goods in pursuance thereof, and afterwards another corporation with the same name is organized by the same persons in Connecticut, but without any consolidation of the two corporations, an action for the price of the shares and of the goods sold can only be maintained by the West Virginia corporation; and an action brought in this Commonwealth in the name common to both corporations, and not stating which of them is the plaintiff, but alleging that the plaintiff made the contract, will be assumed to have been brought by the West Virginia corporation, although it is described as having its usual place of business in Connecticut. And in such action a tender of a certificate of shares, in which the name of the corporation is that common to both corporations, and which does not in terms state the domicil of the corporation, but which is dated in Connecticut, and is signed by an officer of the Connecticut corporation who was not an officer of the West Virginia corporation, will be deemed

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to be a tender of shares in the Connecticut corporation, and not a tender of such shares as the contract calls for. *Craig Silver Co.* v. *Smith*, 262.

2. The treasurer of a corporation has no authority, merely by virtue of his office, to release a claim of the corporation. *Ibid.*

3. A power of attorney executed by a corporation, and authorizing its treasurer to sell the right to use a secret process in Europe, with full power to do everything requisite and necessary in the premises, does not confer authority to pay a sub-agent whom he employs by releasing a large claim which the corporation holds against such sub-agent. *Ibid.*

See CHATTEL MORTGAGE; CITY, 1; ESTOPPEL, 4; EVIDENCE, 1, 7; INSOLVENT DEBTOR, 1–4; MORTGAGE, 2; PASSENGER, 2; PROMISSORY NOTE, 2; RECEIVER; SALE, 2; STREET RAILWAY, 2; TAX, 1.

COSTS.

Where an order of the Superior Court overruling a motion to dismiss a bill in equity for alleged want of prosecution, and a final decree declaring the plaintiff entitled to redeem land sold for taxes, are affirmed by this court on appeal, it is equitable that the defendant should pay the costs. *Stone* v. *Stone*, 474.

COUNTY COMMISSIONERS.

See BOSTON, 1, 2; DRAIN, 3, 4.

COUPON.

See PASSENGER, 1.

COURTS.

See JUDGMENT; JURISDICTION; POOR DEBTOR, 3; SUPERIOR COURT; TRIAL, 8.

COVENANT.

See CONTRACT, 6; LANDLORD AND TENANT; RECEIVER, 2; SPECIFIC PERFORMANCE.

CREDITORS.

See EQUITY, 3–5; ESTOPPEL, 3; INSOLVENT DEBTOR, 1–5; PAYMENT.

CRIMINAL LAW.

See ADULTERY; CONFESSION; CONSPIRACY; ELECTIONS; ESTOPPEL, 1, 2; EVIDENCE, 4, 5, 25–29; EXCEPTIONS, 9; GRAND JURY; INDICTMENT; INTOXICATING LIQUORS, 3–5; MALICIOUS PROSECUTION; MARRIAGE, 3; POLYGAMY; THREAT; TRIAL, 1–7; VERDICT, 2; WITNESS, 1.

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DAMAGES.

1. In an action for breach of a contract of hiring, brought before the expiration of the contract period, the plaintiff is entitled to recover damages for the unexpired portion of such period subsequent to the time of trial. *Cutter* v. *Gillette*, 95.
2. Where the seller sues the purchaser for the contract price of goods he has refused to accept, which goods were to be paid for by instalments, and the title to which was not to pass until the contract price was fully paid, the measure of damage is the difference between the market value at the time and place of delivery and the contract price, and, no evidence having been introduced of that difference, the court can award nominal damages only. *Tufts* v. *Bennett*, 398.
3. A. and B. executed a written agreement, by the terms of which A. was to sell samples of B.'s goods, and solicit orders for samples and for goods to be ordered from the samples, and was to receive a certain commission on the amount of all goods ordered from the samples, if the orders were not rejected by B., and the orders if not rejected in writing within ten days from their date were to be considered as accepted; and the agreement was to continue until such time as B. should discontinue the manufacture of the goods. B. ceased such manufacture and notified A., who, during the preceding two months, had sent B. orders for samples, which he neither filled nor rejected. *Held*, in an action by A. against B. for breach of the agreement, that he could recover nominal damages only. *Noble* v. *Hand*, 289.

See AMENDMENT; AUCTION; CONTRACT, 4, 7; DECEIT, 2; DOWER; EQUITY, 2; EVIDENCE, 8, 15, 18–22; EXCEPTIONS, 10; NEW TRIAL, 1; REPLEVIN.

DEATH.

See EMPLOYERS' LIABILITY ACT, 6, 7; GRADE CROSSING, 1; INTERPLEADER; MASTER AND SERVANT, 4; PARENT AND CHILD; WAY, 1, 7, 8.

DECEIT.

1. In an action of deceit founded on alleged false representations of the defendant contained in a letter, the plaintiff must prove actual fraud, and, so far as the words of the letter are susceptible of explanation, the defendant may show that they were not used in the sense imputed to them by the plaintiff, and that he acted honestly, and that there was no intention on his part to state anything falsely. FIELD, C. J. & HOLMES, J. dissenting. *Nash* v. *Minnesota Title Ins. & Trust Co.* 574.
2. The rule that, on a rescission of a contract for fraud, the plaintiff in an action between the original contracting parties can recover back from the defendant the whole consideration paid for the goods, does not apply where the defendant is a stranger to the consideration, in which case the measure of damages is the difference between the actual value of the

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goods and their value as it would have been if the representation had been true; and a plaintiff who was induced to purchase goods by the fraudulent representations of the defendant, and who has parted with the goods, may recover under a declaration in tort which goes upon a rescission of the contract, if the declaration sufficiently charges the fraud and the damage to the plaintiff resulting from it, after striking out everything alleged in regard to rescission. *Nash* v. *Minnesota Title Ins. & Trust Co.* 574.

See EVIDENCE, 8.

DECLARATION.

If all the counts of a declaration are for the same cause of action, it will not avail the defendant to have some of them held to be bad or unsupported so long as one stands. *Tangney* v. *Sullivan*, 166.

See DECEIT, 2; MASTER AND SERVANT, 3.

DECREE.

See EQUITY, 7–9; MORTGAGE, 2.

DEED.

See CONTRACT, 5, 6; EVIDENCE, 8–10; PURCHASER WITHOUT NOTICE; RESTRICTION; WAY, 7, 9.

DEFAULT.

See VERDICT, 2.

DEFINITIONS.

See WORDS.

DEMAND.

See PROMISSORY NOTE, 1; TROVER, 1.

DEMURRER.

On the overruling of a demurrer the plaintiff is not, as matter of law, entitled to judgment, but the court may direct a trial to be had on the merits on an answer previously filed. *Hobson* v. *Satterlee*, 402.

DEVISE AND LEGACY.

1. A devise by a testator to his wife of all his real property, "for her sole use and comfort during her natural life, and to her heirs and assigns for-

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ever," gives an estate in fee simple; and the provisions of Pub. Sts. c. 126, § 4, do not apply. *Kendall* v. *Clapp*, 69.

2. A testator directed by will that his executors should take charge of his estate on S. Street, and that "so much of the income from this S. Street estate as shall be needed for the payment of the taxes of my real estate and the interest on the mortgage upon said S. Street property shall be used for such taxes and interest, until the estate is disposed of by my executors, . . . and any surplus income shall be used by my executors in reducing the mortgage upon this S. Street estate; . . . Said executors are to keep all the said premises in good repair and pay all taxes levied upon the same, and the net income therefrom shall be equally divided between the heirs of my mother, L., and my wife, E." The mortgage having been paid off, there was income from the estate in the hands of the executors. The principal provisions of the will in favor of the wife were for her life, and the will gave the executors no power to dispose of the above mentioned estate. *Held*, that the trust was to continue during the life of E., and that she took one half of the net income. *Perkins* v. *Stearns*, 247.

3. The provision in a will, "The ballance of my estate is to be kept in trust by the New England Trust Company of Boston, one half the income from which is to be paid to my wife, till the youngest of my children, shall have reach their maturity. After which my wifes portion shall be one forth said income, the ballance being divided equally between my children," must be construed to mean, irrespective of any conclusion derived from an examination of a photographic copy of the will, that until the youngest of his children reached maturity his wife while she lived should receive one half of the income of the fund, and that the balance of the income, that is, the other half, should be equally divided among the children, and that after the youngest of his children reached maturity his wife while she lived should receive one fourth of the income, and that the balance of the income, that is, three fourths, should be equally divided among his children until the last surviving child died. *New England Trust Co.* v. *Pitkin*, 506.

4. After appointing executors and trustees a testator gave by his will to his trustees "as many thousand dollars as I shall have grandchildren at my decease, that is one thousand dollars to each grandchild, in trust." By a codicil which confirmed the will "so far as this codicil is consistent therewith," the testator directed his executors and trustees to pay to certain of his grandchildren, naming them, the sum of one thousand dollars each, within six months after his decease, "it being the amount bequeathed to them in my will in section third." Then follow the words, "The clause in section three in my will is amended in this codicil so that my executors and trustees are to receive one thousand dollars for each of the children of my son, C., and invest the same," etc. C. had three children living at the death of the testator, and two children were born subsequently. *Held*, that, taking the will and the codicil together, it was manifest that the testator intended to limit his bounty to his grandchildren living at his decease. *Richardson* v. *Willis*, 130.

5. A testator, having provided for his wife by will, directed that during her

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life the balance of the net income of the residue should be equally divided among his children, and after the wife's decease all his estate should "be divided into as many equal parts as the number of my children who survive her shall be (the issue of a deceased child always standing *in loco parentis*) and the shares" of the sons to be theirs absolutely. The shares of the daughters were to be held in trust during their respective lives, so as to secure to them the income of their respective shares during life, "and to their respective husbands, if they shall leave their present ones surviving them, the income and produce during the lives of these husbands respectively; and from and after the decease of my daughters and their husbands respectively the trust premises shall go to their respective issue, if any shall then be living; otherwise, the said trust premises shall go to my other children or their issue respectively." The testator left surviving him a widow and five children, A., B., C., D., and E., all of whom survived the widow. D., a daughter, died on December 9, 1885, childless, leaving a husband, who was her husband at the date of the will and who died on May 4, 1894. E. still lived. C. died unmarried before D., on January 18, 1877, leaving a will. A. and B. died after D. and before D.'s husband, testate, and leaving children. *Held*, that one third of D.'s share went to E., one third to the issue of A., and one third to the issue of B., as purchasers. *Lee* v. *Welch*, 312.

See CONTRACT, 8; EQUITY, 1; ESTATES OF PERSONS DECEASED; INTEREST; PUBLIC CHARITY; REMAINDER; TRUST AND TRUSTEE, 2–5; WILL.

DISCHARGE.

See ESTOPPEL, 3; TENDER.

DOWER.

A widow who does not live upon the dower estate has no right to cut the wood thereon for sale, and if a person who is acting for the widow, after being notified by those who have the next estate of inheritance, takes and carries away the wood, he may be held to have converted it, and must pay its value at the time of conversion. *Noyes* v. *Stone*, 490.

DRAIN.

1. Where a nuisance is artificially created by emptying the sewage of dwelling-houses through a private drain in a private way upon abutting private land, there is no right in the board of health of the town to extend the private drain through such private land to a brook thereon, and to clean out the brook that it may be used to carry off the sewage. *Huse* v. *Amesbury Board of Health*, 240.
2. A town has power to widen a common drain, or to clear it from obstructions, although it is upon private land and outside the limits of any highway. *Melrose* v. *Hiland*, 303.

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3. The town of Melrose is bound to maintain and keep in repair, within its own limits, the drain made by the county commissioners under the authority of St. 1869, c. 378. *Melrose* v. *Hiland*, 303.
4. If county commissioners lay out a common drain twelve feet wide in a town, but actually build it at a certain place therein only eight feet wide, the town has power to enlarge the drain to the width of twelve feet, if such enlargement is reasonable and necessary for the purpose of proper drainage. *Ibid.*
5. It is lawful for a town to take from the owner of land therein, through which a common drain is laid, an agreement for reimbursement of the cost to the town of enlarging the drain on his premises. *Ibid.*

See Sewer; Town, 1.

DRUNKENNESS.

See Evidence, 17; Master and Servant, 3.

DUE CARE.

See Action, 5, 6; Employers' Liability Act, 6; Evidence, 12, 13; Grade Crossing, 1; Highway, 5; Infant; Master and Servant, 1, 4, 5, 8–11; Negligence, 4–8; Parent and Child; Passenger, 3; Way, 8.

EASEMENT.

See Drain; Eminent Domain; Evidence, 19–21.

ELECTION.

See Adultery, 2.

ELECTIONS.

1. The offences of falsely making a nomination paper, and of filing the same knowing it to be falsely made, under the St. of 1893, c. 417, § 321, may be charged in the language of the statute without alleging either a fraudulent intent, the manner or means by which the paper was falsely made, or the details in respect to which it was so made. *Commonwealth* v. *Connelly*, 539.
2. The signing by a third person of the name of a voter to a nomination paper, not in his presence and at his request, and the subsequent filing of such a paper, constitute the offences of falsely making a nomination paper and of filing a falsely made nomination paper, within the St. of 1893, c. 417, §§ 78, 321, irrespective of the intent with which the acts were done. *Ibid.*

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ELECTRICITY.

See PASSENGER, 3; TOWN, 2, 3.

ELEVATOR.

See ACTION, 5.

EMINENT DOMAIN.

When land is taken by a city under statutory authority for the protection of its water supply, such taking carries the right to exclusive possession of the surface. *Newton* v. *Perry*, 319.

See EVIDENCE, 18–22.

EMPLOYERS' LIABILITY ACT.

1. If there is no defect in the material, plan, or construction of a staging, the presence of a stone upon it, by the falling of which personal injuries are occasioned to a workman, is not a defect in ways, works, or machinery within the meaning of St. 1887, c. 270. *Carroll* v. *Willcutt*, 221.
2. While, in an action for personal injuries occasioned to the plaintiff by the falling upon him of a ledge stone from a staging near which he was working, the jury might have found that the sole or principal duty of the defendant's foreman was that of superintendence, they were rightly directed to return a verdict for the defendant if the evidence did not justify a finding that the foreman was negligent in not discovering that the ledge stone was so placed as to be liable to fall. *Ibid.*
3. An exploder made of a copper covering filled with fulminate of mercury and discharged by electricity, which is bought by the owner of a quarry to be used and instantly consumed in producing an explosion for the purpose of blasting rock, is not a part of his "ways, works, or machinery," within St. 1887, c. 270, § 1, cl. 1. *Shea* v. *Wellington*, 364.
4. An employer is not liable, under St. 1887, c. 270, § 1, cl. 2, for the negligence of his superintendent in furnishing an employee with a defective appliance, if the employer owes no duty to his employee to have the appliance inspected in regard to its construction before use, and if it is no part of the superintendent's business to make such inspection, unless he assumes so to do, with his employer's knowledge and consent, as a part of the work which, as superintendent, he is employed to do. *Ibid.*
5. While the notices required in an action for personal injuries under St. 1887, c. 270, § 3, and amendments thereto, are not to be construed with technical strictness, enough should appear in them to show that they are intended as the basis of a claim against the defendant, and were given in behalf of the person who brings the suit. *Driscoll* v. *Fall River*, 105.
6. In an action against a railroad corporation under the employers' liability act, St. 1887, c. 270, for causing the death of A., it appeared that he was

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killed while inspecting cars in the defendant's freight-yard by being crushed by a car that was one of two box cars thrown against the car on which he was working by another car kicked off from a train and run on a descending grade with no brakeman upon it until it struck the two cars which were left standing on the track with a space of about six or eight feet between them and the car at the end of which he was working; that he was in the performance of his duty, which required him to inspect the running gear, draw-bars, links, and pins of cars left on the track where he found the car which he was inspecting; that he had no notice that a car was to be kicked off and sent down the grade without a brakeman upon it, so as to strike the two cars as it did; that these two cars were so situated as to cut off from his view the car which was approaching; and that it was contrary to the rule of the railroad corporation to kick off cars and send down a car in that way upon that track. *Held*, that there was evidence tending to show that A. was in the exercise of due care, and that the conductor of the train was negligent. *Mears* v. *Boston & Maine Railroad*, 150.

7. In an action against a railroad corporation under the employers' liability act, St. 1887, c. 270, for causing the death of A., who was struck by a car while he was engaged in his duty of inspecting cars in the defendant's freight-yard, the evidence tended to show that his body was crushed; and a witness, who was near him at the time of the accident, testified that he was "stone dead" when the witness reached him. He also testified that A. took two or three steps after he was struck, and then fell. *Held*, that there was evidence that A. died without conscious suffering. *Ibid.*

See ACTION, 4; MASTER AND SERVANT, 2–4.

EQUITY.

I. *Jurisdiction and General Principles.*

1. The claim of legatees as to the disposition to be made of certain property on the happening of a certain event will not be considered under a bill for instructions brought by the executors of the will, if on the claims made the executors have no present duty to perform with respect thereto. *Perkins* v. *Stearns*, 247.

2. A. acquired, either by grant or as appurtenant to his land, a right of way over a driveway to a public street. B., who owned land abutting on the way, obstructed a part of the way by the erection of a fence. A. thereupon brought a bill in equity against B. for an injunction and for damages. During its pendency B. erected another fence which wholly obstructed the way. The judge who heard the case found that no laches were attributable to A. in bringing the suit, or in asserting his rights; that the fence could be easily removed, and without great or disproportionate injury and loss to B.'s property; and that it was the obvious intention of B. to prevent A. from using the way as originally located, and to appropriate the same to the uses and purposes of his premises, to the permanent exclusion of A. therefrom for use as a passageway from his premises to the street. *Held*, that A. was entitled to a mandatory and perpetual injunction for the re-

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moval of the obstructions, and to nominal damages. *Boland* v. *St. John's Schools*, 229.

3. Upon a bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285, to reach and apply the defendant's interest in a copartnership in payment of a debt due the plaintiff from him, the court has the power to establish the plaintiff's debt, although he is not a judgment creditor. *Draper* v. *Hollings*, 127.

4. A bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285, to reach and apply the defendant's interest in a copartnership in payment of a debt due the plaintiff from him, set forth an agreement in writing made on a certain day, whereby the plaintiff sold and the defendant bought an undivided one-half interest in another partnership then existing between the plaintiff and A., for a sum named, in six months from the date of the agreement, provided the plaintiff could buy from A. his interest; and alleged the immediate purchase by the plaintiff of A.'s interest, and a notification to the defendant thereof. *Held*, that the bill showed that there was a "debt" due from the defendant to the plaintiff, within the statute. *Ibid.*

5. A bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285, to reach and apply the defendant's interest in a copartnership in payment of a debt due the plaintiff from him, set forth an agreement in writing made on a certain day, whereby the plaintiff sold and the defendant bought an undivided one-half interest in another partnership then existing between the plaintiff and A., for a sum named, in six months from the date of the agreement, provided the plaintiff could buy from A. his interest; that the plaintiff and defendant, on the same day the agreement was made, entered into written articles of copartnership, to continue until dissolved by the mutual agreement of the parties, which partnership was conditional upon the purchase by the plaintiff of A.'s interest in the partnership between him and A.; the immediate purchase of this interest and notification thereof to the defendant; and a delivery to the defendant of a bill of sale of a one-half interest in the tools and machinery formerly owned by the copartnership of the plaintiff and A., which tools and machinery constituted the whole of the property and assets of this copartnership; and that the defendant had ever since acted as a copartner with the plaintiff, and had never demanded any further or other assignment or conveyance of the same to him. *Held*, that the bill showed performance by the plaintiff of his part of the contract with the defendant. *Ibid.*

See INJUNCTION, 1, 3; MORTGAGE, 2; NAME, 2; PARTNERSHIP, 2; RAILROAD COMMISSIONERS; REDEMPTION; SALE, 4; SPECIFIC PERFORMANCE; TRADEMARK, 4; TRUST AND TRUSTEE, 1.

II. *Pleading and Practice.*

6. A bill in equity by A. to restrain B. and C. from doing certain acts as partners, in violation of a written agreement executed by A. and B. upon the dissolution of a partnership existing between them, is not multifarious. *Holbrook* v. *Nesbitt*, 120.

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7. In the absence of statute or of a rule of court, it is within the discretion of the presiding judge to refuse to dismiss a bill in equity on which a preliminary injunction has been issued and served merely because no subpœna was taken out or served until more than three months after the filing of the bill. *Stone* v. *Stone*, 474.

8. When a decree on its face is consistent with law, and may have been justified by the evidence, and when it agrees with the frame and carries out the plain object of the bill, this court will not go into nice verbal criticism of the bill for the first time on appeal. *Stratton* v. *Seaverns*, 73.

9. A bill in equity was brought to restrain the defendant from disclosing processes and formulas which in his contract with the plaintiff he had agreed not to divulge to any person or corporation, and the decree recited that matrices made by the defendant from the formulas and processes "as manufactured prior to the filing of the bill and to the hearing of the cause" came within the agreement. *Held*, that the words quoted referred to one kind of matrix only, the manufacture of which was begun before the date of the bill and was continued up to the hearing, and that the allegation that the defendant's matrix was covered by his agreement was of the same scope as the decree, although the decree used the plural instead of the singular. *Ibid.*

10. Upon an appeal from a decree of a justice of the Superior Court dismissing a bill in equity, after a hearing upon the merits, the evidence having been reported to this court, and the report containing no statement of rulings made or of facts found, if the evidence warranted a finding of facts on which the decree could properly be made, the decree must be affirmed; and, so far as the decision depends on findings of fact, it will be sustained, unless the findings are clearly erroneous. *Wentworth* v. *S. A. Woods Machine Co.* 28.

See Costs; Estates of Persons Deceased, 4; Injunction, 2; Interpleader; Receiver, 2.

ESTATES OF PERSONS DECEASED.

1. In an action against the executor of a will to recover a legacy, an answer to the effect that administration was not completed, and that the condition of the estate would not permit the payment of the legacy, is informal, and contains no defence. *Fitch* v. *Randall*, 381.

2. In an action against the executor of a will to recover a small legacy, proof by the plaintiff of the filing of an inventory by the defendant, showing assets of many thousand dollars, makes a *prima facie* case, without further proof that the debts were all paid and that assets remained in the hands of the executor. *Ibid.*

3. In an action against the executor of a will to recover a legacy, even if the facts sought to be introduced by asking the register of probate to state the contents of certain papers which are among the probate records are competent in themselves, the proper mode of proving them is by putting in certified copies of the papers or records, or the papers or records themselves. *Ibid.*

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4. On a petition to this court by A., asking for the construction of a provision of a will to the effect that certain real estate on the decease of the life tenant, who was the testatrix's husband, should go to "my said sister A., and in case of her death before the death of my said husband, then to her heirs at law, and to my niece B. and my nephew C., to have and to hold the same to them equally and as tenants in common," the court said that the petition would not lie, as this was not a case in which the petitioner had any duties to perform under the will, or needed the instruction of the court as to any duties arising in the administration of the testatrix's estate, but that as the case had been fully argued, and as all parties desired an opinion, it would say that it was of opinion that A. took only one undivided third part of the real estate, and that B. and C. each took an undivided third part. *Austin* v. *Bailey*, 270.

5. The expenses of administration, including the expenses of the contest over the probate of a will, so far as they are made a charge upon the estate, are to be taken from the corpus thereof. *Bartlett, petitioner*, 509.

See ADMINISTRATOR; DEVISE AND LEGACY; DOWER; EQUITY, 1; INTEREST; INTERPLEADER; LIMITATIONS, STATUTE OF.

ESTOPPEL.

1. The prosecution of a person for keeping intoxicating liquor with intent to sell it unlawfully is no bar to a use of the testimony in the case to prove him guilty of keeping and maintaining a common nuisance. *Commonwealth* v. *McCabe*, 98.

2. The conviction of the defendant on a complaint for keeping and maintaining a common nuisance on April 1, 1893, and on divers other days and times between that day and December 27, 1893, to wit, a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors, is no bar to a complaint for keeping on April 29, 1893, intoxicating liquors with the intent to sell the same unlawfully in this Commonwealth, although the evidence relied on in the second complaint was a part of the evidence in the former one. *Commonwealth* v. *McCabe*, 400.

3. If two firms consisting in part of the same members are included in the same proceedings in insolvency, and a non-resident creditor holds a claim against each firm and proves against only one of them, and votes for assignee, and takes a dividend thereon, the granting of a discharge to the debtors will not debar him from subsequently maintaining an action upon the other claim. *Pattee* v. *Paige*, 352.

4. If an officer of a corporation, who is also a mortgagee of its property, in reply to inquiries concerning the financial standing of the company, falsely represents that its property is unencumbered, with intent to induce a sale of goods to it on credit, he is later estopped to set up his mortgage against the attachment of one who sold goods to the company relying on his statements, or against an officer who acted for the creditor in making the attachment. *Baker* v. *Seavey*, 522.

See POOR DEBTOR, 2.

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EVIDENCE.

1. Parol evidence of an agreement between the manager of a street railway company and the superintendent of streets of a city, permitting the company to remove snow from the streets with snow ploughs, is competent where it appears that the written agreement has been mislaid and cannot be produced. *Ovington* v. *Lowell & Suburban Street Railway*, 440.

2. At the trial of an action for breach of a contract, the defendant having put in evidence what purported to be a letter to himself signed by the plaintiff, and having asserted that this was all of the letter which he received at the time, though at other times he had received other letters from the plaintiff, the judge allowed the plaintiff to show that the paper produced did not contain the whole of the letter as written, and that something material had been cut off from the top. *Held*, that the evidence was competent, and that it was not necessary for the plaintiff to give notice to produce other letters. *Robinson* v. *Cutter*, 377.

3. In an action of deceit by A. and others against B., founded on false representations of B. contained in a letter to C. as to the title of certain real estate upon which bonds were issued by C., another letter from B. to D. is competent evidence against B., not only as a statement that C. said he sold bonds to D., who was one of the plaintiffs and who acted as agent of others of the plaintiffs in the purchase of bonds from C., but as an assumption that what he said was true, and as an implication that the information had been communicated in such a way and under such circumstances as to be trustworthy, the letter being in the nature of an admission that the sale had been made as C. said it had. *Nash* v. *Minnesota Title Ins. & Trust Co.* 574.

4. At the trial of an indictment for polygamy a writing, purporting to be a letter written to the mother of the defendant's first wife, signed by the defendant "A. B., your son in law," and identified as his handwriting, is competent evidence against him. *Commonwealth* v. *Hayden*, 453.

5. At the trial of a criminal case on the question whether or not the defendant was married, an officer at the state prison at the time when the defendant was said to have been committed, four years before, testified that it was his duty to ask the prisoners certain questions when they entered the prison, and to keep a record of the answers, and that the defendant said, in answer to a question whether he was married, that he was not married. The defendant objected to the admission of the evidence, on the ground that the record should be produced. *Held*, that the entries did not constitute such a record as precluded parol evidence of the facts stated in them. *Commonwealth* v. *Walker*, 226.

6. Evidence not admissible if objected to, when admitted without objection, has its natural probative effect. *Damon* v. *Carrol*, 404.

7. A corporation sold land to A., taking his promissory note in part payment, and executing an instrument of even date by which it agreed to convey the land to A. by a good and sufficient deed on payment of the note. Before the note matured, the corporation made a trust deed of all its real estate, including that sold to A., to secure the payment of bonds

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which were issued and sold. In an action in the name of the corporation against A. upon the note, the defence to which was a failure of consideration, a report made by a receiver of the corporation to the stockholders, bondholders, and creditors, which did not appear to have been made in the performance of any official duty, but apparently was volunteered with a purpose to serve the interests of persons connected with the corporation, was admitted in evidence. The nature of the receivership did not appear. *Held*, that the report was not admissible. *Fort Payne Coal & Iron Co.* v. *Webster*, 134.

8. On the issue of the abandonment of part of a railroad location originally five rods wide, evidence was offered that the owner of land adjoining the locus filed a petition to the county commissioners for the assessment of damages for land taken from him, in which it was alleged that the railroad had taken a strip "four rods in width or thereabouts"; that damages were awarded, which, by agreement of the parties, were to be paid within a time limited, whereupon the railroad company was to receive a deed of land extending more than two and a half rods on the other side from the centre line of the road and up to the locus; and that the deed was delivered in escrow. The damages were not paid by the company as agreed, nor was the deed delivered to it. *Held*, that the evidence was inadmissible. *Smith* v. *New York & New England Railroad*, 569.

9. On the issue of abandonment of part of a location originally five rods wide, a deed to the railroad company of land eight hundred feet away from the locus, tending to show that the road there was only four rods wide, is inadmissible. *Ibid.*

10. On the same issue, a lithographic plan of house lots, referred to in such deed for the lot conveyed, purporting to show the railroad for a considerable distance including the locus, but not purporting to be drawn to scale, is inadmissible. *Ibid.*

11. In an action to recover a passenger fare a railroad corporation may put in evidence its printed schedule of trains to show that a certain train did not stop regularly at a certain station. *New York & New England Railroad* v. *Feely*, 205.

12. In an action against a railroad corporation for personal injuries occasioned to the plaintiff while alighting from a train which had arrived within the limits of a station, although not at the portion of the station at which its passengers were expected to leave it, evidence of the usage of the road that one train should not enter a station while another train was engaged in delivering passengers there, is competent upon the question whether the defendant's servants managed the train in a proper manner; and if the plaintiff knew of it bears also upon the question whether he used due care. *Floytrup* v. *Boston & Maine Railroad*, 152.

13. In an action against a railroad corporation for personal injuries occasioned to the plaintiff while alighting from a train, it appeared that the train had arrived within the station but not at that portion of it where passengers were expected to leave the train. The stop was made, not to deliver passengers, but to allow another train to deliver its passengers. The plaintiff's evidence tended to show that three passengers preceded

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him and had alighted, and that while the train remained stationary he had one foot off the lower step when the train started without warning and threw him upon the platform. The defendant's evidence tended to show that the train stopped from thirty seconds to a minute, and that it was again in motion when the plaintiff was on the second step from the top, the car having four steps, and that the train continued in motion while he descended the remaining steps and stepped from the train. The plaintiff offered evidence to show that when the train reached the station, and before it stopped, the words, "Lynn, change for Boston," were called by some one so as to be audible to the passengers, and in the manner in which stations are usually announced. The evidence was excluded because it did not appear that the call was made by any person employed by the defendant. *Held*, that whether the announcement was made by a railroad man or by another person, it was competent both upon the question whether the plaintiff's conduct was careful, and upon the question whether the defendant's servants used due care to prevent him from alighting at a time when the train was not stopped to deliver passengers. *Floytrup* v. *Boston & Maine Railroad*, 152.

14. In an action against a railroad corporation for personal injuries occasioned to a passenger in alighting from a train within the limits of a station where the train had stopped, not to deliver passengers, but to allow another train to deliver its passengers, testimony of a brakeman that he did not hear an authorized announcement of the station accompanied by a direction to "change" for another station is competent as bearing upon the question whether it was his duty to warn passengers who appeared to be about to leave the train that it had not stopped to allow them to alight; and testimony offered in rebuttal, that such an announcement was made, has some tendency to contradict the testimony of the brakeman, and is admissible for that purpose. *Ibid.*

15. In an action for breach of a contract of hiring, the defendant has no ground of exception to the exclusion of evidence, upon the cross-examination of the plaintiff, offered to show that his personal reputation as to credit among dealers was so poor that he could not get credit to carry on the business in which he attempted to work after his wrongful discharge from the defendant's service. *Cutter* v. *Gillette*, 95.

16. In an action for personal injuries, evidence of a general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that, if the master had exercised due care, he might have learned or heard of the incompetency; but the reputation of a foreman amongst a few workmen employed under him is inadmissible, as it is merely the opinion of a small number of men, of which there is no reason to suppose that the master may be cognizant, or which he may be bound to heed. *Driscoll* v. *Fall River*, 105.

17. At the trial of an action for personal injuries occasioned to the plaintiff, and for damages caused to his horses and wagon, by collision with the defendant's street car, testimony as to the plaintiff's habits is not admissible to contradict evidence that he was intoxicated at the time of the accident, nor is it admissible to meet the testimony brought out by the

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plaintiff on cross-examination of a witness for the defendant that the plaintiff had been seen intoxicated several times before the accident, as, the latter testimony being immaterial, the plaintiff was not entitled to contradict it. *Carr* v. *West End Street Railway*, 360.

18. At the trial of a petition for the assessment of damages caused by laying out and constructing a way over land, which was a stone quarry, the rock of which extended beyond the limits of the location, the respondent city has no ground of exception to the admission of evidence that rock claimed to be suitable for quarrying, and situated on the petitioner's remaining land adjacent to the way, had been shattered in constructing the way by the explosion of dynamite in large drill-holes sunk very deeply, as shown by marks in the faces of the rock; and it is immaterial whether the work of constructing the way was done by the servants of the city, or by an independent contractor. *White* v. *Medford*, 164.

19. When land or an easement in land is taken under the right of eminent domain, and damages are to be assessed as a compensation to the owner for the value of the land taken and the injury, if any, to his remaining land, the owner may put in evidence the reasonable cost of any necessary adaptation of his land to the new state of things produced by the public work for which his land was taken, if the adaptation and the cost are proper, having reference also to the market value of his own estate; and when such damages are to be assessed, if it is contended by the respondent that the damages are offset in whole or in part by some special and peculiar benefit caused to the petitioner's property by the public work for which his land was taken, the fair and reasonable cost to the petitioner of making that special and peculiar benefit practically available is to be taken into account in ascertaining the amount of special and peculiar benefit to be offset, and so may be given in evidence by the petitioner upon the assessment of damages. *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, 386.

20. At the trial of a petition for the assessment of damages for the taking of an easement in the petitioner's land, under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, 1890, c. 270), the petitioner contended that the laying of the State sewer through his land, which was used as slaughtering and rendering works, with drainage into a river, made a new adaptation of his works to the changed condition of affairs necessary and proper; and he introduced in evidence, without objection, an order from the State board of health to discontinue his drainage into the river, and subsequent letters to him from the sewer department of the city and the Metropolitan Sewerage Commission, concerning a plan of a particular or private sewer which he proposed to make to connect his works with the State sewer, which letters tended to show that such plan was satisfactory to both of those authorities; and there had been a view of the premises by the jury. The State sewer had been completed, and the petitioner was then building his proposed sewer upon his land parallel with the State sewer and connecting with it at three points. He was asked to state the expense of his particular sewer, and the question was excluded. *Held*, that the evidence should have been admitted. *Ibid.*

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21. At the trial of a petition for the assessment of damages for the taking of an easement in the petitioner's land, under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, 1890, c. 270), the respondent was allowed to show the mode of construction of the State sewer, and to introduce evidence tending to prove that the sewer would carry a considerable weight of buildings over it, and that, as repairs could be made from the inside through the man-holes, it would never be necessary to disturb the soil in repairing it. *Held*, that the evidence was competent. *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, 386.

22. At the trial of a petition for the assessment of damages caused to the owner of land taken in fee by a city for a public purpose, evidence is competent of a change of grade in the land taken, though established and made after the taking, which renders the construction of a retaining wall necessary to the safety of the petitioner's remaining land; and the petitioner may recover the cost of such retaining wall as a part of his damages. *Manson* v. *Boston*, 479.

23. In an action for libel for the publication of an article charging a person with unnecessarily failing to provide his cattle with proper shelter from the weather, the defendant in his answer alleged in justification that the publication was true, and introduced evidence to show the condition of the plaintiff's barn upon the day when the article was published, in that it contained cracks in the boarding. The plaintiff, in rebuttal, offered testimony to show that from the early fall to March 1st, on the 23d day of which month the article was published, the cracks were covered up with hay so that the wind and cold did not penetrate the barn. The judge instructed the jury that such evidence would not be competent, unless they found that the libel covered the said period previous to the publication, and the defendant excepted. Witnesses for the defendant having testified that on the date of the libel the barn was cold, the plaintiff, in rebuttal, was allowed to ask certain witnesses who had examined the barn on and about the date of the publication, "State whether or not the barn was cold or warm," each of whom answered that it was warm; and the defendant excepted. *Held*, that the evidence in rebuttal was properly admitted. *Loker* v. *Campbell*, 242.

24. At the trial of an action of replevin it appeared that the plaintiff claimed title to the property under a mortgage, subsequently to the recording of which the property was attached by the defendant, a constable, as the property of the mortgagor, upon a writ in favor of a creditor of the mortgagor. On August 13, 1888, which was previous to the attachment and subsequent to the recording of the mortgage, the mortgagor sold and delivered the property to A. The defendant contended that the sale was made by the mortgagor in fraud of his creditors, and that A. participated therein. B., who testified that he was engaged in July and August, 1888, in the manufactory where the property was, was asked, "Did you see him [the mortgagor and vendor] around there?" He replied, "He was there nearly every day." There was evidence that after the purchase A. moved to another State, but there was no evidence that he had any knowledge that the vendor was around the manufactory after the purchase.

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The question and answer were admitted, in connection with other evidence, as tending to show the vendor's fraudulent purpose in selling the property, and not A.'s participation therein, which participation was found by the judge on other evidence. *Held*, that they were rightly admitted. *Ashcroft* v. *Simmons*, 437.

25. At the trial of a complaint for keeping and maintaining a liquor nuisance there was evidence that men had been seen going into a side door in the defendant's house, some of them coming out under the influence of liquor, and that from this side door there was a path to a side door in another house, in a room of which, locked with a brass padlock, was found whiskey, and a key fitting the padlock was in the defendant's house. On the same day the defendant's daughter, who was about seventeen years old and lived with her, after looking up and down the street in front of the houses, went from the defendant's side door to the other several times, in a loose dress, and returned holding her dress as if she had something under it. An officer seized the object from the outside, and found it a hard substance like a quart bottle, and the defendant ordered the officer to let the girl go, the officer saying, "Let me see what that is," and the defendant answering, "No, I won't." *Held*, that the evidence was admissible in connection with the other facts, and that the mode in which the officer got his knowledge of what the girl had in her hand did not make the fact inadmissible. *Commonwealth* v. *Welch*, 372.

26. At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof, for the purpose of influencing their action on the granting of the licenses, evidence that, at a meeting of the mayor and aldermen, held after the inception of the conspiracy but before the licenses were granted, it was voted, on motion of one of the indicted aldermen, that applications for licenses should be referred to the mayor and aldermen instead of to a committee on licenses consisting of the mayor and two aldermen, as theretofore, is competent against the alderman making the motion at least, and against the other indicted aldermen if they voted for it. *Commonwealth* v. *Smith*, 411.

27. At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof, for the purpose of influencing their action on the granting of the licenses, it is competent for the prosecution to show the names of all the applicants for such licenses, although later in the case the names of the successful applicants appear. *Ibid.*

28. At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof, for the purpose of influencing their action on the granting of the licenses, the prosecution, in order to fix a date, may show the date when a licensee was permitted to transfer his license from one place to another; and, for the same purpose, that a witness, after a conversation with one of the defendants, at once telephoned to a certain person. *Ibid.*

29. At the trial of an indictment for a conspiracy to solicit applicants for

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licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof, for the purpose of influencing their action on the granting of the licenses, one of the indicted aldermen, who between the two meetings of the mayor and aldermen at which the licenses were granted, and during the existence of the conspiracy, is shown to have been in company with another defendant, S., a wholesale liquor dealer in Boston, with whom he had no subject of common interest except the granting of the licenses, and to have gone to Boston on the invitation of S., may be asked on cross-examination, for the purpose of affecting him only, but not S., as to his knowledge of what was publicly said after the first lot of licenses was granted as to the connection of the defendant S. with the granting of them. *Commonwealth* v. *Smith*, 411.

30. In an action for personal injuries occasioned to the plaintiff's intestate while in the defendant's employ, by coming in contact with a revolving shaft having a keyway in the end, the evidence of a witness called as an expert to show that a keyway in a shaft enhances the ordinary dangers of a revolving shaft is properly excluded. *Connelly* v. *Hamilton Woolen Co.* 156.

31. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of a staging on which he was standing when at work upon a building, it appeared that the fall of the staging was caused by the breaking of a piece of hemlock board somewhat cross-grained, called a ledger-board, on which as a cross-piece the plank rested upon which the plaintiff stood, and which was fastened at one end to a cleat nailed to the side of the building and at the other end to an upright post. The following question was put to a witness, and excluded: "Assuming that the staging is built of a piece of cross-grained hemlock, six inches wide, or thereabouts, is used for a ledger-board, as has been stated here, and it breaks down, what could you say was the cause of that breaking down?" *Held*, that the question was properly excluded. *Twomey* v. *Swift*, 273.

32. In an action for personal injuries received by the plaintiff, who was a deck hand on the defendant's boat, from the blow of a swinging spile which was being transferred from another boat owned by the defendant, by means of a derrick and steam hoisting engine, without the use of a guide rope, a witness who was an expert in the manner of using derricks and hoisting timbers was asked the following question: "Whether or not, having heard the derrick described, a derrick equipped as this was, without a guide rope, is a safe and proper derrick to raise spiles of that kind?" to which he answered, "No." He was then asked, "What would be the usual and proper way of attaching a guide rope there?" referring to the hoisting in question; and, in his answer, described the method to be used. *Held*, that the questions and answers were properly admitted in evidence. *Lang* v. *Terry*, 138.

33. In an action for damages to the plaintiff's schooner caused by grounding in a dock in F., where it was to deliver a cargo of coal to the defendant, under a bill of lading stipulating that fifteen feet of water at high water or an ordinary tide were guaranteed, the plaintiff alleged that the

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grounding was due to the want of the guaranteed depth of water, to which the defendant replied that the schooner did not come in until the tide had fallen. It appeared that the accident happened between a quarter to seven and seven o'clock in the morning. The defendant, for the purpose of proving that high tide on that morning at P., which was fifteen miles from F. in a straight line and more by water, was at half past five o'clock, offered in evidence an automatic register of a tide gauge kept by the city of P. and used by the United States in calculating the tides. This evidence was excluded; but the expert who produced the register was allowed to testify, from his data as to the tide in P., to a time of high tide in F., and he fixed it between twenty and thirty-eight minutes past five. There was other evidence that, under conditions like those testified to on the morning in question, the difference in the time of high tide at P. and F. would not be more than five or six minutes; and direct evidence of the state of the tide at F. was put in by both parties. *Held*, that it could not be said that the ruling excluding the evidence offered was wrong. *Phillips* v. *Haddock*, 201.

See ADULTERY, 2; ANSWER; AUCTION; CONFESSION; CONTRACT, 5; DECEIT, 1; ESTATES OF PERSONS DECEASED, 2, 3; ESTOPPEL, 1, 2; EXCEPTIONS, 2, 5–10; EXPERT; GRAND JURY, 2; HIGHWAY, 3, 4; INSOLVENT DEBTOR, 7; INTERROGATORIES TO ADVERSE PARTY; INTOXICATING LIQUORS, 5; MARRIAGE; MASTER AND SERVANT, 6, 10, 11; NEGLIGENCE, 4, 8; NEW TRIAL, 3; POOR DEBTOR, 1, 3; SUPERIOR COURT, 2; TRIAL, 1–5, 7; TROVER, 3, 4; WAY, 7, 8; WITNESS.

EXCEPTIONS.

1. A petition to establish the truth of exceptions should contain an exact copy of the bill of exceptions which was filed. *Ryder* v. *Jenkins*, 536.
2. A bill of exceptions which, though conformable to the truth, set forth at great length a report of the testimony taken at the trial, and disclosed no attempt to reduce the exceptions to writing in a summary mode, as required by Pub. Sts. c. 153, § 8, was for that reason properly disallowed by the presiding judge. *Ibid.*
3. A bill of exceptions, if ambiguous, will be so construed as to raise only the questions raised and passed upon in the Superior Court. *Damon* v. *Carrol*, 404.
4. A point not raised at the trial is not open upon a bill of exceptions. *Chesebro* v. *Barme*, 79.
5. An exception will not be sustained to the exclusion of evidence which the bill of exceptions does not show to have been material. *White* v. *Medford*, 164.
6. No exception lies to the exclusion of evidence which is not reported and shown to be material. *Commonwealth* v. *Smith*, 411.
7. In an action of replevin no exception lies to the order of the court for a return of the chattel to the defendant if the bill of exceptions fails to show that the court had no power to order the return. *Giroux* v. *Wheeler*, 48.

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8. If an action for malicious prosecution is brought to this court by exception to the refusal of a ruling that, upon all the evidence, the plaintiff cannot maintain his action, and the bill of exceptions only purports to set forth all the evidence showing that the defendant acted in or controlled the prosecution, and not all the evidence in the case, that point alone will be considered, and the question whether the plaintiff failed to make out a want of probable cause is not open. *Tangney* v. *Sullivan*, 166.
9. At the trial of a complaint for keeping a liquor nuisance evidence was introduced that four men drove up to the defendant's house; that one of them entered and then returned with a bottle, from which they all drank; that one of them went back and came out with the bottle filled again; and that the defendant accompanied him as far as the piazza and stood there as they drove away. It did not appear from the bill of exceptions that this was all the evidence in the case. *Held*, that it could not be said that the evidence was inadmissible; it might have been made competent by other evidence; although the court did not mean to intimate that, if it stood alone, it would be incompetent. *Commonwealth* v. *McCarthy*, 168.
10. In an action for personal injuries the defendant requested a ruling that "there was no evidence that the plaintiff had suffered any loss in his business, or any diminution in the income therefrom, or that he has been compelled to relinquish or abandon the same, and that there can be no recovery therefor." The judge declined so to rule, and instructed the jury, in substance, that as the plaintiff admitted that the evidence would not justify a finding of a payment by him of one thousand dollars for nursing, or an abandonment of a business from which at the time of the accident he was realizing $2,500 a year, as alleged in the declaration, they should not find those specific sums as damages. There was some evidence that the plaintiff was prevented by his injury from attending to his business in the usual manner, and the jury returned a verdict in his favor. *Held*, that the instructions were correct, and that, as all the evidence of the nature and extent of the plaintiff's injuries was not set out in the exceptions, it could not be said that the ruling requested by the defendant should have been given. *Warren* v. *Boston & Maine Railroad*, 484.

See Evidence, 15; Expert, 3; Negligence, 4; New Trial, 1; Trial, 5, 7, 8; Verdict, 1.

EXECUTION.

1. When a judgment is recovered in a court having jurisdiction, and the execution thereon is issued by the proper officer, irregularities either in the mode of issuing it or in the execution itself, do not make it void; and it may be dealt with by the court upon motion of either party, and amended or annulled as justice may require; and service of it, if it is not annulled, or service restrained or suspended, is not invalid. *Chesebro* v. *Barme*, 79.
2. An alias execution, issued before the return day of the original execution, is valid, and the arrest thereon of the debtor after such return day is lawful. *Ibid.*

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8. An officer's return on an execution levied upon land of the debtor contained the following recital: "I gave notice in writing to the within named judgment debtor of the time and place of sale by leaving the same at her last and usual place of abode, and by mailing a like notice to her address, as described in said execution, in a securely sealed envelope, fully prepaid." *Held*, that this return satisfied the requirements of Pub. Sts. c. 172, § 46, and showed sufficiently, (in the absence of evidence to the contrary,) that the place of service was within the officer's precinct, and was the last and usual place of abode of the debtor. *Holmes* v. *Jordan*, 147.

4. Under Pub. Sts. c. 172, § 29, providing that the officer shall give notice in writing to the debtor of the time and place of the sale of land on execution, and "shall also cause notifications thereof to be posted up in some public place in the city or town where the land lies, and also in two adjoining cities or towns if there are so many in the county," the posting of one notification in the town where the land lies is sufficient. *Ibid.*

5. The recital in an officer's return upon an execution, that he took "all the right in equity" which the debtor then had "to redeem the following described mortgaged real estate," does not invalidate a sale of the land upon the execution, although at the time of the levy there had been no breach of the condition of the mortgage. *Ibid.*

6. The word "lands," in an execution directing the officer to cause the debt to be satisfied "of the goods, chattels, or lands of the said judgment debtor," embraces any interest authorized by the law to be taken. *Ibid.*

7. If an execution issued upon a judgment recovered by the plaintiff as executor recites a recovery by him personally, and it appears from the record that this defect is merely a clerical error, an amendment will be allowed as of course from the record without other evidence, and the execution may be treated as amended in the trial of a writ of entry to recover land sold on the execution. *Ibid.*

See Action, 3; Poor Debtor, 1, 2; Summary Process for Recovery of Land.

EXECUTOR.

See Administrator; Equity, 1; Estates of Persons Deceased, 1–3; Execution, 7.

EXPERT.

1. In an action for an alleged breach of a warranty in the sale of flour, a witness, who has been a miller for more than twenty years and has been accustomed to use a process for analyzing flour that is also used by others more or less, may well be found to be an expert in regard to the quality and principal component parts of flour, and the fact that he is not a practical chemist does not necessarily make his testimony valueless. *Davis* v. *Mills*, 481.

2. In an action for an alleged breach of a warranty in the sale of flour, the

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fact that considerable time has elapsed between the sale of the flour and an examination of it by an expert witness does not render his evidence incompetent, if there is testimony that there would be but little change in the flour if it was properly kept. *Davis* v. *Mills*, 481.

3. If soon after the beginning of the testimony of an expert witness in an action for an alleged breach of a warranty in the sale of flour, the judge of his own motion excludes certain specimens of other flour from the consideration of the jury, and all testimony in regard to them is stricken out, and the defendant makes no objection and takes no exception to the exhibition of the specimens, but his objections and exceptions are on general grounds to receiving the testimony of the expert at all, and nothing is said by the witness in regard to the specimens excluded, and the only complaint of the defendant is that they were in the hands of the witness and were shown to the jury with a specimen of the flour sold by him, he has no ground of exception. *Ibid.*

See EVIDENCE, 30–33.

EXTORTION.

See THREAT.

FALL RIVER.

See INTOXICATING LIQUORS, 1.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION, 2, 3.

FALSE PRETENCES.

See MALICIOUS PROSECUTION, 2.

FALSE REPRESENTATIONS.

See DECEIT; ESTOPPEL, 4; EVIDENCE, 3.

FEE.

See DEVISE AND LEGACY, 1; EVIDENCE, 22; WAY, 9.

FELONY.

See VERDICT, 2.

FENCE.

See EQUITY, 2.

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FERRY.

See Railroad Commissioners.

FIXTURE.

See Sale, 3.

FORCIBLE ENTRY AND DETAINER.

See Summary Process for Recovery of Land.

FOREIGN LAW.

The law of a sister State is presumed to be the same as our own, when not shown to be different. *McIntyre* v. *Boston & Maine Railroad*, 189.

See Will.

FORFEITURE.

See Intoxicating Liquors, 1, 3; Railroad Commissioners; Sale, 2.

FRAUD.

See Deceit; Estoppel, 4; Evidence, 3, 24; Insolvent Debtor, 2-4; Insurance; Malicious Prosecution, 2; Partnership, 1; Promissory Note, 3.

FRAUDS, STATUTE OF.

See Will.

FRAUDULENT CONVEYANCE.

See Evidence, 24; Insolvent Debtor, 2-4.

GAS.

See Master and Servant, 11; Town, 2, 3.

GENERAL AVERAGE.

1. The obligation to contribute to a general average loss, or to general average expenses, springs from the law itself, and not from any contract between the parties concerned, and rests upon the vessel, the cargo, and the freight in proportion to their respective values, and upon the owners of each in proportion to the value of their property at risk; and it may be enforced by resorting to a lien upon the property saved from the common

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peril, or by action against the persons bound to contribute. *Marwick* v. *Rogers*, 50.

2. A charter-party contained the following clause: "It is further agreed that all liability of charterers under the agreement shall cease as soon as the cargo is shipped on board. All questions, whether of demurrage or otherwise, to be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose." *Held*, that, under this clause, the charterer, who was also the owner of the cargo, was not released from his obligation to contribute to the payment of general average expenses. MORTON, J., dissenting. *Ibid.*

GIFT.

See DEVISE AND LEGACY; PUBLIC CHARITY.

GOOD WILL.

See NAME, 2.

GRADE CROSSING.

1. In order to recover damages of a railroad company under Pub. Sts. c. 112, §§ 212, 213, for causing the death of a person at a crossing, it must be shown that the deceased was in the exercise of due care, and that the defendant neglected to sound its whistle or to ring its bell as required by Pub. Sts. c. 112, § 163, as amended by St. 1890, c. 173, § 1. *Livermore* v. *Fitchburg Railroad*, 132.

2. An owner of land taken by a decree of commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, is entitled, after the report of the commissioners has been filed in the Superior Court, to present in that court objections to the confirmation of the report, and to be heard thereon. *Old Colony Railroad, petitioner*, 356.

3. The decision of commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, on the question whether the quantity of land taken at a particular point is reasonably necessary for the convenient construction of the work, is final, in the absence of irregularity of procedure or of gross error, and cannot be revised by this court upon the petition of the landowner. *Ibid.*

See NEGLIGENCE, 3–5; WAY, 1, 5, 7, 8.

GRAND JURY.

1. A special police officer is not exempt from serving as a grand juror, nor would his exemption absolutely disqualify him from service. *Commonwealth* v. *Hayden*, 453.

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2. A grand juror may testify before the grand jury of which he is a member without affecting either the validity of an indictment in another case presented at the same sitting of the court at which he testified, or the rights of the defendant therein. *Commonwealth* v. *Hayden*, 453.

3. A motion to dismiss is not the proper mode of raising either the question of the validity of an indictment presented by a grand jury of which a special police officer was a member, or the objection that a member of the grand jury testified before it in another matter at the same sitting of the court at which the indictment was presented, inasmuch as neither of the causes alleged in avoidance of the indictment are matters apparent on the record. *Ibid.*

See WITNESS, 1.

HABITUAL CRIMINAL.

See INDICTMENT.

HIGHWAY.

1. A town may be found to be liable for damages where a heavily loaded four-horse wagon is thrown into the gutter by the passing of the rear wheel over a stone on the surface of a narrow rounded and icy roadway at a point not far from a culvert through which a brook crosses the roadway, and where, in the attempt to get the wagon again upon the usual path without unloading it, it is overturned and carried into the brook. *Carville* v. *Westford*, 544.

2. A jury may find that a rounded roadway only eleven feet wide and covered at least in part with smooth hard ice, and with a steep slope at the side into a gutter encumbered with snow, where the roadway is crossed by a brook, and with no railing by the side of the roadway or upon the culvert, is a defective way, even in a sparsely settled locality, and at the season when sleighing has just ended and travel is upon wheels. *Ibid.*

3. In an action against a city for personal injuries occasioned by an alleged defect in a highway, the question whether there is a dangerous place or object so near the line of travel that travellers will be likely to be injured by it unless a railing is provided for their protection, is ordinarily one of fact for the jury; but if, in the view of the evidence most favorable to the plaintiff, the risk of injury is so small that it would be unreasonable to require the city to provide the railing, the court will decide it as a question of law, and order a verdict for the defendant. *Scannal* v. *Cambridge*, 91.

4. Earth was dug out of a street in a city in the construction of a sewer, and dumped upon an adjacent field, which was somewhat lower than the street, and the fence on the side was taken away for a little distance. There was a sidewalk of gravel over eight feet wide nearly on a level with the street, with little depth of gutter to separate it from the travelled part of the way. The earth so dumped in the field had settled so as to be about two inches lower than the sidewalk, and sloped but very little for a few feet, then sloped more decidedly until, at about seventeen feet from

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the line of the street, it fell off quite rapidly from the edge of the embankment about two and a half feet to the level of the field. This earth had been graded somewhat imperfectly, and it was not very rough. A person was driving along the way in the daytime, when his horse became frightened, wheeled suddenly to the right, went across the sidewalk into the field over the soft earth, and then swerved to the left, causing the right wheels of the wagon to be at a lower level than the left wheels, and descended the embankment, the driver being thrown out and injured. *Held*, in an action against the city for his injury, that there was no evidence which would warrant the jury in finding the way to be defective. *Scannal* v. *Cambridge*, 91.

5. If a traveller on a highway in a city loses complete control of the horse which he is driving, and such loss of control is not momentary only, but is a permanent condition, and he is injured, he cannot maintain an action against the city for his injury, although the way is defective. *Ibid.*

See ACTION, 4; AMENDMENT; DRAIN, 2; EVIDENCE, 1, 18; GRADE CROSSING; NEGLIGENCE, 3–5; SEWER, 2; STREET RAILWAY; WAY.

HUSBAND AND WIFE.

1. The liability of a husband and of his wife, who is doing business on her separate account, for debts incurred by her in carrying on the business, if the certificate required by Pub. Sts. c. 147, § 11, has not been recorded, is several, and not joint. *Browning* v. *Carson*, 255.

2. If the promissory note of a married woman who is doing business on her separate account is taken, by the understanding of both parties, in payment of an existing account for goods sold her by the payee, and no fraud or deceit is practised upon the latter, he cannot, upon discovering that the certificate provided for by Pub. Sts. c. 147, § 11, has been recorded, rescind the transaction by returning the note, and maintain an action against the maker's husband upon the account; and it is immaterial that when the note was given the payee did not know that the certificate had been recorded. *Ibid.*

3. Although a married woman may not be liable upon a promissory note made by her and her husband, payable to the latter's order and indorsed by him, he is still liable as maker. *Ibid.*

4. If A. and B., her husband, make a promissory note payable to and indorsed by him, and A. also makes another note, both of which are given to C. in payment of an account for goods sold by him to A., who is doing business on her separate account, and the first note is void as to her, but not as to B., and the settlement made by the second note is afterwards repudiated by C., who proves his whole account against the estate of A. in insolvency, the amount received from such estate must be regarded, in an action by C. against B. on the first note and on the account, as received *pro rata* in part payment of the note as well as of the account, and to this extent, if he is not liable on the account, the amount apparently due on the note should be reduced. *Ibid.*

See ADMINISTRATOR, 2; CONTRACT, 8; DEVISE AND LEGACY, 1, 2; DOWER; INSOLVENT DEBTOR, 5; MARRIAGE; POLYGAMY.

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ILLEGALITY.

See DECEIT; EVIDENCE, 24; INSOLVENT DEBTOR, 2-4; INSURANCE; INTOXICATING LIQUORS.

INCOME.

See DEVISE AND LEGACY, 2, 3; INTEREST, 3; PUBLIC CHARITY, 4-8; TRUST AND TRUSTEE, 2, 4, 5.

INDICTMENT.

1. A motion to quash an indictment on the ground that it should not contain allegations of former convictions and sentences of the defendant, with a view to proving that he was an habitual criminal, is rightly overruled, as such allegations, under St. 1887, c. 435, § 1, are not only proper, but necessary. *Commonwealth* v. *Walker*, 226.
2. A motion to quash an indictment on the ground of a misjoinder of counts is rightly overruled if it is obvious that the indictment was intended to charge the defendant in one count with the crime of breaking and entering a building with intent to commit the crime of larceny therein, and with having been twice convicted of crime, sentenced, and committed to prison for terms of not less than three years each, and to charge him in another count with an attempt to commit the same crime, and with having been in like manner previously convicted of crimes and sentenced; and, the meaning being obvious, unnecessary words may be rejected as surplusage. *Ibid.*

See ADULTERY; CONSPIRACY; EVIDENCE, 4, 5, 26-29; GRAND JURY, 2, 3; MARRIAGE, 3; POLYGAMY; TRIAL, 1-4; VERDICT, 2; WITNESS, 1.

INDORSEMENT.

See ADMINISTRATOR, 2; CHATTEL MORTGAGE.

INFANT.

1. A boy of average intelligence, between nine and ten years of age, cannot recover for personal injuries sustained by falling into a man-hole in the public street of a city, if he voluntarily adopted a dangerous method of approaching the man-hole, and his injury was a natural consequence of his carelessness. *Casey* v. *Malden*, 507.
2. The owner of premises, and the contractor who is erecting for the owner a building thereon, are not liable to a boy five years of age, who, without any invitation or inducement, trespasses upon the premises, falls into a

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trench, and dies from the effect of the injuries received thereby. *Grindley* v. *McKechnie*, 494.

See MASTER AND SERVANT, 5, 7; PARENT AND CHILD; TRUST AND TRUSTEE, 1.

INFORMATION.

See CONSTITUTIONAL LAW, 1.

INJUNCTION.

1. The plaintiff in a suit in equity against A. & B. was formerly in partnership with A., carrying on a law and collection business under the name of "F. & C.," each owning a one-half interest in the firm. This business had been carried on under that name for twenty years, and for the last twelve years by the plaintiff and A. The plaintiff conveyed to A. his one-half interest "in the business of law and collections of the firm of F. & C.," except as stated in an instrument of even date signed by the two, reserving to himself "the name 'F. & C.,' excepting as agreed in said" instrument. In that instrument A. conveyed to the plaintiff "all his right and interest in the name F. & C., with all the printed stationery and envelopes now on hand printed in that name"; and reserved "the right only to advertise he was lately of said firm, and to indorse checks in that name for collection or deposit only that pertain to business now in the hands of F. & C. or their correspondents, and to collect bills now due said firm"; and agreed to vacate the office occupied by the firm by a day named, and assign his interest in the lease to the plaintiff, who assumed the rent on the lease. The instrument further provided that all cases pending in court should remain in the plaintiff's charge, "subject to the right of the clients." Immediately after this agreement was signed, A. took an office in the same building in which the business of F. & C. had been carried on, and entered into partnership with B., an attorney at law, who had formerly been employed by F. & C. A. and B. then sent to the former clients and correspondents of F. & C. circulars announcing the dissolution of the partnership between the plaintiff and A., and the formation of the new firm of A. and B., who, "having purchased the entire interest of" the plaintiff "in the business of F. & C., . . . will continue to carry on the same business" at the place stated; and containing the following: "All inquiries relating to old matters formerly in the hands of F. & C. should be made of, and all communications addressed to," A. and B. They also sent to the correspondents of F. & C. a notice, as follows: "In all matters of business of F. & C. now in your hands, make all checks, drafts, etc. payable to the order of" A. and B. "only, and address all communications and correspondence to" A. and B. This was signed "F. & C." *Held*, that these facts did not entitle the plaintiff to an injunction against A. and B. *Holbrook* v. *Nesbitt*, 120.
2. A bill in equity to restrain the doing of certain acts, which does not allege

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that the defendant was continuing to do such acts when the bill was filed, shows no ground for an injunction. *Holbrook* v. *Nesbitt*, 120.

3. A person who was formerly in the employ of a firm, and who engages in a similar business, displaying upon his office a sign containing underneath his name the words "late of" the firm, will not be enjoined, if the sign is not painted in such a manner as to be likely to mislead the public. *Ibid.*

See EQUITY, 2, 7; NAME, 2; PARTNERSHIP, 2; SALE, 4; TRADEMARK, 4.

INSANITY.

The insanity of one contracting party does not give to the other the right to avoid the contract. *Atwell* v. *Jenkins*, 362.

See CONTRACT, 1; TRUST AND TRUSTEE, 1.

INSOLVENT DEBTOR.

1. A petition in insolvency cannot be maintained against a corporation which failed to dissolve an attachment within the time provided in Pub. Sts. c. 157, § 136, but dissolved the same before the actual filing of the petition. KNOWLTON, J., dissenting. *Marble* v. *Jamesville Manuf. Co.* 171.

2. Proceedings in insolvency against a corporation, under Pub. Sts. c. 157, § 136, are not required to be begun within ninety days from the act relied on, as provided by § 112 in the case of similar proceedings against a person. *Steel Edge Stamping & Retinning Co.* v. *Manchester Savings Bank*, 252.

3. A delay of nearly six months in beginning proceedings in insolvency against a corporation, under Pub. Sts. c. 157, § 136, based upon an assignment by the corporation of all its property for the benefit of particular creditors as a fraudulent conveyance, when the creditor "had full knowledge that the assignees were working in good faith" under the assignment, is not, in the absence of special circumstances and of statutory limitation, laches as matter of law. *Ibid.*

4. An assignment of all its property by a corporation for the benefit of such creditors as shall execute the instrument within thirty days from its date, or within such further time, if any, as the trustees shall allow, is a "fraudulent conveyance," within the meaning of Pub. Sts. c. 157, § 136, and a sufficient foundation for insolvency proceedings against the corporation. *Ibid.*

5. An attachment by a wife who is living apart from her husband of his property, under the Pub. Sts. c. 147, § 35, is subject to the Pub. Sts. c. 157, § 46, which provides that an assignment made under § 44 of the latter statute dissolves "any attachment on mesne process made not more than four months prior to the time of the first publication" of notice of the filing of the petition, in cases of involuntary proceedings in insolvency. *Place* v. *Washburn*, 530.

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6. In proceedings for a composition in an insolvency case, the debtor, if dissatisfied with the allowance of a claim against his estate, has no right of appeal to the Superior Court. *Thomson* v. *Poor*, 26.
7. An assignment in insolvency is conclusive evidence, in an action by the assignee for the conversion of the insolvent's goods, of the plaintiff's authority to sue, and it is not open to the defendant to contest the validity of the insolvency proceedings. *Palmer* v. *Jordan*, 350.
8. The title of a purchaser of property in good faith, after the seller has filed a petition in insolvency, is invalid as against that of the latter's assignee. *Ibid.*

See ADMINISTRATOR, 1; ESTOPPEL, 3; HUSBAND AND WIFE, 4; MORTGAGE; PARTNERSHIP, 1; RECEIVER, 2; SALE, 4, 5; SUPERIOR COURT, 1.

INSTRUCTIONS.

See EQUITY, 1; EXCEPTIONS, 10; NEGLIGENCE, 5; TRIAL, 6, 7.

INSURANCE.

1. In an action upon a policy of life insurance, the application for which contains an agreement that its answers and statements shall be part of the contract of insurance, and that any false, incorrect, or untrue answer shall render the policy void, whether answers and statements in the application were misrepresentations, and, if so, whether, under St. 1887, c. 214, § 21, they were "made with actual intent to deceive," or "the matter misrepresented increased the risk of loss," are questions of fact for the jury. *Levie* v. *Metropolitan Life Ins. Co.* 117.
2. An application for a policy of life insurance stated that it was "declared and warranted that all the statements and representations contained in" the same were "material" and "true," and, "with the stipulated premiums," should "be the sole basis of the contract . . . if a policy be issued . . . thereon, and that if any concealment, or fraudulent or untrue statement or representation be made," the policy should be void. The application contained certain questions and answers, at the end of which, and above the applicant's signature, was the following: "I hereby warrant said answers to be true." The policy recited that, "in consideration of the stipulations and agreements in the application herefor and upon the next page of this policy, all of which are a part of this contract," and in consideration of the payment of the premium thereon, the company promised to pay to the beneficiary a certain sum upon satisfactory proofs of the death of the assured. *Held*, in an action upon the policy, that St. 1887, c. 214, § 21, relating to the effect of a "misrepresentation" made in the negotiation of a policy of insurance, applied to the policy in suit. *White* v. *Provident Savings Life Assurance Society*, 108.
3. If a person goes to the office of a physician and tells him that he has coughed and spit blood, and desires him to make a physical examination, to which he submits, receiving a prescription and paying for the physician's ser-

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vices, and subsequently calls again at the latter's office, consulting him professionally and paying him a fee, such person is "attended" by a physician, within the meaning of the question in an application for a policy of life insurance, "When and by what physician were you last attended, and for what complaint?" *White* v. *Provident Savings Life Assurance Society*, 108.

INTENTION.

See DECEIT, 1; ELECTIONS; INTOXICATING LIQUORS, 3, 4; MALICIOUS PROSECUTION, 1; MECHANIC'S LIEN, 1; POLYGAMY.

INTEREST.

1. A provision in a will which extends the time of payment of legacies to certain institutions, and which was intended to affect only the convenient and most profitable management of the estate does not take the legacies generally out of the operation of the rule that legacies draw interest at the rate of six per cent per annum from one year from the death of the testator. *Bartlett, petitioner*, 509.
2. A bequest in trust, within Pub. Sts. c. 136, §§ 24, 25, which provide that the income shall be payable from the death of the testator, and shall be apportioned in case of the death of the life tenant, draws interest at the rate of six per cent per annum, simple interest, from the death of the testator; and the life tenant having died after the testator, there being no provision as to the termination of the trust, the interest up to the time of his death is payable to his estate, and the principal fund belongs to the residue of the testator's estate. *Ibid.*
3. A testator provided by his will that, if at his decease his property should be depressed in value, the executors were to defer the payment of legacies to certain institutions "until such time as in their good judgment it would seem best to dispose of as much of said properties as would be required to pay these legacies in full, not exceeding five years," and directed that the average annual income from his property "shall be considered, if less, an equitable sum to be divided and paid" to the institutions. *Held*, that interest on the amounts given from one year from the death of the testator for the next four years was to be reckoned at the rate of the average annual income received from the property if less than six per cent, and after the expiration of five years from the death of the testator at the rate of six per cent, simple interest, per annum. *Ibid.*

INTERPLEADER.

A fraternal order, which, upon the surrender of a benefit certificate issued by it to a member, issues to him in its place another certificate promising to pay a certain sum upon his death to a different person from the one named in the first certificate, may maintain a bill of interpleader against both beneficiaries and the administrator of the deceased member's estate

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to have it determined to whom the fund shall be paid; and it is immaterial that the beneficiary named in the second certificate has paid the assessments and dues of the member since a certain date. *United Order of the Golden Cross* v. *Merrick*, 374.

INTERROGATORIES TO ADVERSE PARTY.

An interrogatory intended not to elicit evidence in support of any matter of defence alleged by the defendant, but only to ascertain the evidence relied on by the plaintiff to maintain his case, is not within Pub. Sts. c. 167, §§ 49–56, and there is no ground for the contention that the plaintiff waived his right to refuse to answer the interrogatory by answering other interrogatories which he could not have been compelled to answer. *Davis* v. *Mills*, 481.

INTOXICATING LIQUORS.

1. The board of police of Fall River have the power, under St. 1894, c. 351, § 2, to order licenses of the first and fourth classes for the sale of intoxicating liquors to be forfeited and revoked for a breach of the conditions thereof. *Sullivan* v. *Borden*, 470.
2. Whether certiorari will lie in case it appears that a board of police exceeded their jurisdiction under a statute in forfeiting and revoking a license for the sale of intoxicating liquors, *quære*. *Ibid.*
3. Intoxicating liquors are subject to forfeiture if the servant of the owner, who has immediate charge and control of them, intends to sell them contrary to law. The law deals with the *res* as itself liable to offend. *Commonwealth* v. *Intoxicating Liquors*, 42.
4. Guilty knowledge that one is acting in violation of law is not essential to the offence of selling intoxicating liquors, and a servant is responsible if he has made a sale, however innocently, which the law forbids him to make. *Commonwealth* v. *Green*, 103.
5. At the trial of a complaint for keeping and maintaining a liquor nuisance three police officers testified that on a certain day they visited the defendant's tenement, and in the kitchen found four men sitting with bottles of beer, out of which they had been drinking; that the defendant was there, and that they took the bottles and beer from the men, who objected, saying in the hearing of the defendant that they had bought and paid for the beer, and that the officers ought not to take it. *Held*, that, if the statement was to be believed, it fairly, although not necessarily, implied that the men bought the beer there, and not that they bought it elsewhere and carried it to the defendant's kitchen to drink it. *Commonwealth* v. *McCabe*, 98.

See CONSPIRACY; ESTOPPEL, 1, 2; EVIDENCE, 25–29; EXCEPTIONS, 9; TRIAL, 5.

JAIL.

See BOSTON.

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JUDGE.

See EQUITY, 7, 8, 10; EXCEPTIONS, 10; EXPERT, 3; MECHANIC'S LIEN, 3; NEW TRIAL; REPLEVIN; SUPERIOR COURT, 2; TRIAL, 5–8.

JUDGMENT.

A judgment of a court of this Commonwealth which had jurisdiction of the subject and the parties cannot be avoided by plea and proof in an action of contract upon it. *Pearse* v. *Hill*, 493.

See ACTION, 3; DEMURRER; EQUITY, 3; ESTOPPEL, 2; EXECUTION; REDEMPTION.

JURISDICTION.

The Municipal Court of the City of Boston has jurisdiction of an action on a replevin bond, if the sum demanded is within the jurisdiction of that court, even though the action of replevin was brought in the Superior Court. *Walker* v. *Cooke*, 401.

See EXECUTION, 1; INTOXICATING LIQUORS, 1, 2; JUDGMENT; TRUST AND TRUSTEE, 1; TRUSTEE PROCESS.

JURY.

See CONSTITUTIONAL LAW, 1; EMPLOYERS' LIABILITY ACT, 2; EXPERT, 3; GRAND JURY; HIGHWAY, 2–4; INSURANCE, 1; LIBEL; MALICIOUS PROSECUTION, 2, 3; MASTER AND SERVANT, 10; NEGLIGENCE, 2, 4, 7, 8; PARENT AND CHILD; PASSENGER, 3; TRIAL, 5–8.

LACHES.

See INSOLVENT DEBTOR, 3; SALE, 1; WRIT OF REVIEW.

LAND DAMAGES.

See EVIDENCE, 18–22.

LANDLORD AND TENANT.

1. An unlawful use of premises by a sub-tenant is a breach of the covenant in a lease of the premises not to "make or suffer" any unlawful use of the premises, whether known by the lessee or not. *Miller* v. *Prescott*, 12.
2. The acceptance, after the breach of a covenant in a lease of premises known to the lessor, of rent already accrued, accompanied by an express agreement that the breach is not thereby waived, does not affect the right of the lessor to enter for such breach. *Ibid.*

See ACTION, 5.

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LARCENY.

See INDICTMENT, 2.

LAW AND FACT.

See DEMURRER; EMPLOYERS' LIABILITY ACT, 2; EQUITY, 10; HIGHWAY, 3, 4; INSOLVENT DEBTOR, 3; INSURANCE, 1; LIBEL; MALICIOUS PROSECUTION, 2, 3; MASTER AND SERVANT, 10; NEGLIGENCE, 2, 4, 7, 8; PARENT AND CHILD; PASSENGER, 3.

LEASE.

See CONTRACT, 4; LANDLORD AND TENANT; RECEIVER, 2; SALE, 4, 5; SPECIFIC PERFORMANCE; SUMMARY PROCESS FOR RECOVERY OF LAND.

LEGACY.

See DEVISE AND LEGACY; INTEREST; PUBLIC CHARITY.

LETTERS PATENT.

See TRADEMARK.

LIBEL.

At the trial of an action for libel for the publication of an article charging a person with unnecessarily failing to provide his cattle with proper shelter and protection from the weather, within the meaning of Pub. Sts. c. 207, § 52, the judge declined to rule that the article was not actionable, and submitted to the jury the questions whether it was fairly to be understood as charging the plaintiff with cruel treatment of his cows by unnecessarily failing to provide them with sufficient shelter or protection from the weather, and whether it also referred to and charged cruel treatment by failing to furnish sufficient shelter during the winter preceding the date of the libel. *Held*, that the refusal to rule, as matter of law, that the publication was not actionable, was right, that the ruling submitting to the jury the construction of the article was sufficiently favorable to the defendant, and, further, that the court was inclined to think that the judge could have ruled as matter of law that the publication was libellous. *Loker* v. *Campbell*, 242.

See EVIDENCE, 23.

LICENSE.

See ACTION, 7; CONSPIRACY; EVIDENCE, 26–29; INTOXICATING LIQUORS, 1, 2; LIMITATIONS, STATUTE OF; TRIAL, 2.

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LIEN.

See Assault and Battery; General Average; Tender.

LIFE ESTATE.

See Devise and Legacy, 1, 2; Estates of Persons Deceased, 4; Interest, 2.

LIFE INSURANCE.

See Insurance.

LIMITATIONS, STATUTE OF.

If, ten years after the appointment of an administrator of an estate consisting of real and personal property, the heirs at law, of whom the administrator is one, make without license of court a mortgage of certain land of which the intestate died seised, and which was included in the administrator's inventory and the proceeds of which are included in the administrator's account as an item with which he charged himself, such proceeds are not new assets within the meaning of Pub. Sts. c. 136, § 11. *Shute* v. *Wilkins*, 491.

LIVERY STABLE.

1. It is the duty of the keeper of a livery stable to furnish to a hirer a horse which does not have a vicious habit of running and kicking, and if he knows of the existence of such habit in a horse, or if, by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous, he is liable for such injuries as result from his wrongful conduct. *Lynch* v. *Richardson*, 160.
2. If the keeper of a livery stable lets to a hirer a horse somewhat advanced in years, which he has owned for more than a year, and which has long had a habit frequently manifested of viciously kicking and trying to run away when started for home after having been out for a considerable time, and this viciousness has been known before the owner bought it to persons who never owned the horse, in an action against the owner for injuries occasioned by the viciousness of the horse to the hirer, who was free from fault and in the exercise of due care, the jury will be warranted in inferring knowledge on the part of the defendant of such viciousness. *Ibid.*

LOWELL.

See Street Railway, 2.

MAGISTRATE.

See Poor Debtor, 3-5; Public Officer.

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MAIL.

See EXECUTION, 8.

MALICIOUS PROSECUTION.

1. It is not a defence to an action for malicious prosecution that a third person swore to the complaint, if he acted in good faith on the defendant's information, and the defendant intentionally induced him so to do. *Tangney* v. *Sullivan*, 166.
2. In an action for false imprisonment and for malicious prosecution on a complaint for obtaining goods under false pretences, the pretence relied on being contained in the written statement as to the condition of his affairs, "Own real estate assessed on valuation of ? 5,000," made by the plaintiff to the defendant's firm, on the faith of which they sold the plaintiff goods, the question whether when he made the complaint the defendant believed that the plaintiff meant his written statement to be understood as it naturally would be understood, and as the defendant might be supposed to have understood it when he sold the plaintiff goods on the faith of it, or whether in consequence of what he had been told afterwards he believed that the plaintiff expected his statement to be understood as the plaintiff testified that he understood it, is a question of fact, and, if material under the circumstances of the case, should be submitted to the jury. *Connery* v. *Manning*, 44.
3. In an action for false imprisonment and for malicious prosecution, the alleged false imprisonment being an arrest upon the criminal complaint constituting the alleged malicious prosecution, it was argued that the defendant was not liable because he acted upon the advice of counsel; but whether a fair statement of the facts was laid before his lawyer by the defendant, and whether he was honestly following advice honestly asked, was in dispute, and it was not plain what the precise element of doubt was. *Held*, that the plaintiff was entitled to go to the jury, notwithstanding the advice. *Ibid.*

See EXCEPTIONS, 8.

MARITIME LAW.

See EVIDENCE, 33; GENERAL AVERAGE.

MARRIAGE.

1. A marriage may be proved by the testimony of either of the contracting parties. *Commonwealth* v. *Hayden*, 453.
2. An attested copy of the record of a marriage from the records of the city registrar of Boston, certified to by the assistant registrar, is admissible in evidence. *Ibid.*
3. At the trial of an indictment for polygamy, in proof of the defendant's unlawful marriage, the testimony of a witness who performed the cere-

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mony that he was a clergyman in Boston, and an ordained minister and pastor of a Congregational church, and that he had been such pastor for many years, is at least competent to prove that he was *de facto* discharging the office of an ordained minister, and is competent circumstantial or presumptive evidence within the Pub. Sts. c. 145, § 31, from which the fact of marriage may be inferred. *Commonwealth* v. *Hayden*, 453.

See EVIDENCE, 5; POLYGAMY.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. A workman attempting a dangerous task, which he can do safely if the other persons concerned act with due care, may be found to be in the exercise of ordinary care, although accepting the obvious risks of his work; and he may have compensation for personal injuries, if back of all obvious dangers there is a breach of duty on the part of his employer, the risk of which he has not assumed, and which may fairly be found to have been the cause of the accident. *McPhee* v. *Scully*, 216.

2. A foreman having authority to employ and dismiss men, who has charge of a job and gives all the directions to the men, and does not work and is not expected to work with his own hands, is a person whose sole or principal duty is that of superintendence, although there is a general superintendent over him. *Ibid.*

3. If a drunken superintendent employed by a master chargeable with knowledge of his intemperate habits allows machinery to be operated by a workman who is evidently intoxicated, and orders the intoxicated workman to do an act which must obviously cause unnecessary danger to another workman, who is thereby hurt, a breach of duty to the latter both at common law and under the employers' liability act may be found on the part of the master which will support a declaration either at common law or under the act. *Ibid.*

4. If a person who voluntarily undertakes to whitewash the walls and ceiling of a card-room in a mill while the machinery is in operation, and who has been specially cautioned to look out for the pulleys and shafting, receives injuries which cause his death by coming in contact with a revolving shaft, as a result apparently of losing his balance while at work standing upon an elevated staging, no action can be maintained, either at common law or under the employers' liability act, St. 1887, c. 270, for his injuries; and it is immaterial that there was a keyway in the end of the shaft which made it more likely to catch his clothing than a plain shaft, the shaft being in the same condition when he was hurt as when he began to whitewash the room. *Connelly* v. *Hamilton Woolen Co.* 156.

5. An employee over twenty years of age and of average intelligence cannot recover of his employer for injuries occasioned in the use of a hay-cutting

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machine operated by horse power, if the elements of danger were obvious, and were such as ordinary prudence ought to have made him avoid without warning or instructions. *Stuart* v. *West End Street Railway*, 391.

6. In an action by a brakeman for injuries occasioned by the breaking of a defective stake used to hold a load of ties upon a platform car, evidence which shows merely that his employer supplied lumber enough to be sawed for the stakes, and good lumber enough and men enough to prepare them, and that the defective stake was among those so prepared, justifies a finding that the defective stake was there through the negligence of the men whose duty it was to prepare the stakes, and for that negligence at least the employer was liable. *McIntyre* v. *Boston & Maine Railroad*, 189.

7. A., who was nearly twenty-one years old, and who two years previously had been employed in a factory for several weeks, working some of the time with a circular saw, applied at B.'s factory for work. B.'s superintendent took him to a workman, and asked the latter if he had any work for A. to do. The man took A. to a circular saw, and asked him if he had ever run a saw; and A. replied that he had a very little, but was not an experienced hand. The man then set the gauge and ran through two or three sticks, and then told A. to go to work. A. did so, and the man watched him run through two or three sticks and then went away, giving no instructions to A., who asked for none, and who informed no one that he was in need of instructions. He continued to work upon the saw for ten days, when he was injured. *Held*, in an action by him against B. for his injury, that at the time when the accident occurred he was not so young and inexperienced that it was a breach of duty on B.'s part not to give him warning or instruction. *Wilson* v. *Steel Edge Stamping & Retinning Co.* 315.

8. A workman who feeds a circular saw by means of his hand, knowing a safer practicable method, is not in the exercise of due care. *Ibid.*

9. In an action for personal injuries occasioned to a employee by the falling on him of a door set in grooves which he was lifting by main strength, it appeared that the plaintiff knew that the door was not in the condition in which it was intended to be used and that it wanted the appliance which would make it safe, and that if he had notified the defendant's carpenter it would have been put in proper condition, but he had not notified him and it was not the carpenter's duty to inspect the door of his own motion. *Held*, that the plaintiff was not entitled to demand, instead of repairs, such secondary precautions as would make it safe to use the door in an unnatural way, and that the action could not be maintained. *Cunningham* v. *Merrimac Paper Co.* 89.

10. In an action for personal injuries occasioned to the plaintiff, a carpenter, while in the defendant's employ, by the fall of a staging on which he was standing when at work upon a building, it appeared that the fall of the staging was caused by the breaking of a piece of board called a ledger-board, on which as a cross-piece the plank rested upon which the plaintiff stood; that this ledger-board, which was a piece of hemlock somewhat cross-grained, was about four or five feet long, six inches wide, and seven eighths of an inch thick, and was fastened at one end to a cleat

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nailed to the side of the building, and at the other end to an upright post: and that the accident happened on a cold day in winter. There was evidence that hemlock boards of the thickness of seven eighths of an inch, but of different widths, were the only materials furnished by the defendant which could properly be used for the support of the planks which formed the floor of the staging; that hemlock boards of that thickness are not suitable material for the construction of stagings; that hemlock boards are usually of coarse grain; that in cold wet weather they readily fill with moisture and freeze, and become very brittle; that when filled with frost it is difficult to detect the grain; that they are not as strong as many other kinds of lumber, and are not commonly used for staging, particularly in cold weather; that a carpenter of ordinary skill might not know the great danger of using hemlock boards as supports in the construction of stagings; and that the plaintiff had nothing to do with the construction of this staging. *Held*, that there was evidence that the defendant had not used due care in furnishing suitable materials for the staging; and that the question whether the plaintiff used due care in going upon it was for the jury. *Twomey* v. *Swift*, 273.

11. An employee cannot recover for personal injuries received while painting the inside of a tank by the explosion of gas generated by the varnish used by him, which explosion was caused by a lighted torch held by a fellow workman at the employee's suggestion, if there is no evidence that the varnish was different from what the employee had used for twelve years, or that the employer knew of any difference, or that he contemplated the use of a torch. *Lyons* v. *Boston Towage & Lighterage Co.* 158.

12. In an action for personal injuries occasioned to the plaintiff, while engaged in blasting in the defendant's quarry, by an explosion of dynamite in a drill-hole which he was loading, it appeared that the method of blasting was to insert in the hole a dynamite cartridge and an "exploder," which was made of a copper covering filled with fulminate of mercury and discharged by electricity; that there are several kinds of exploders in general use; that the kind used by the defendant was as good as any made; that the manufacturer of them made from six thousand to eight thousand a day, packed them in boxes containing fifty each, and sold them in the open market ready for use; and that the making of exploders is a business in itself requiring skill, technical knowledge, and special machinery and appliances, and they are never made by quarrymen. The plaintiff testified that one of the exploders furnished him on the day of the accident had a seam through which the mercury could be seen. The manufacturer of them testified, and his testimony was uncontradicted, that he never saw one with a seam in it; that they were tested several times in the process of manufacture; that, when completed, they were dipped in melted wax at a certain heat, which left a glazing of wax over the whole exploder; and that, if there was a seam in an exploder when it was dipped in wax, it would explode. The defendant's superintendent testified that he had used this kind of exploder for years and never saw one with a seam in it, or one which exposed the mercury. There was no evidence tending to show that up to the time of the accident an exploder

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of this kind with a seam in it, or with any other defect of construction, had ever been discovered by anybody. *Held*, that there was no duty on the defendant's part to inspect the exploders as to their construction before they were used. *Shea* v. *Wellington*, 364.

See ACTION, 4, 5, 7; CONSTITUTIONAL LAW, 2; EMPLOYERS' LIABILITY ACT; EVIDENCE, 12-16, 30-32; INTOXICATING LIQUORS, 3, 4; NEGLIGENCE, 6.

MAYOR AND ALDERMEN.

See BOSTON, 1, 2; EVIDENCE, 26-29; TRIAL, 2.

MECHANIC'S LIEN.

1. If the statement of account filed by a person seeking to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under a contract for labor and materials in the erection of a house, sets out the amount due, which the court finds to be the true amount, it is no objection to the statement that it does not set out the contract price or the credits to be allowed for materials to the person with whom the petitioner contracted, it being admitted that there was no intention to mislead, and it being found by the court that the party entitled to notice of the statement was not misled by it, as provided for in St. 1892, c. 191, amending Pub. Sts. c. 191, § 6. *Borden* v. *Mercer*, 7.
2. A. held an agreement from B. to sell him the land on which a building was being erected by A., on condition that the latter should complete the building at his own expense and in his own behalf, B. making the advances for that purpose, which were to be paid back before the land was conveyed. C. made with A. a sub-contract to furnish labor and materials in the erection of the house. B. saw C. at work, and afterwards told him that he had given A. the money to pay him. *Held*, upon a petition by C. against B. to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under his sub-contract, that this agreement was with the consent of the owner of the building, within § 1. *Ibid.*
3. A finding of the judge upon the trial of a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under a contract in the erection of a house, that the labor was reasonably worth what was charged for it, disposes of a request for a ruling which was refused, that the petitioner could not charge a profit on his own labor, or on the labor which he furnished, above the amount which he actually paid for the labor, or which was the going price of that class of labor. *Ibid.*

MEMORANDUM.

DEATH OF MR. JUSTICE HOAR, 597.

METROPOLITAN SEWERAGE ACT.

See EVIDENCE, 19-21.

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MILL.

See TAX, 1.

MINOR.

See INFANT; MASTER AND SERVANT, 5, 7; PARENT AND CHILD; TRUST AND TRUSTEE, 1.

MISTAKE.

See NEW TRIAL, 4; TRIAL, 8.

MORTGAGE.

1. A mortgage covering both real estate and personal property, given to a trustee to secure the payment of an issue of negotiable bonds, and duly recorded with the records of mortgages of personal property but not recorded in the registry of deeds until more than three years after its date, is a "mortgage of real estate," within the meaning of St. 1888, c. 393, and the real estate cannot be held under the mortgage as against an assignee in insolvency of the estate of the mortgagor appointed in proceedings in insolvency begun before the expiration of a year from the recording of the mortgage. *Harriman* v. *Woburn Electric Light Co.* 85.
2. A mortgage of all its real estate and personal property "now owned or hereafter to be acquired" was given by a corporation to a trustee to secure the payment of an issue of bonds. The trustee, which was a corporation, became insolvent, and its property went into the hands of a receiver. A holder of some of the bonds brought a bill in equity for the appointment of a receiver of the corporation issuing them, alleging its insolvency, for the appointment of a trustee to succeed the insolvent trustee, and for a foreclosure of the mortgage. A receiver was thereupon appointed, the decree reciting that "It is hereby declared, upon agreement of the parties, that this decree is without prejudice to any proceedings in insolvency, voluntary or involuntary, by or against the defendant"; and, referring to the possible appointment of an assignee in such proceedings, and providing that in such case the assets should remain in the hands of the receiver until the further order of the court, it declared that this was to the end, among other things, "that the value of the assets of said corporation may, so far as possible, be preserved unimpaired for the benefit of all persons entitled thereto, and at the same time any supposed rights depending on the appointment of an assignee in insolvency may not be prevented by these proceedings from springing into existence." Subsequently voluntary proceedings in insolvency were begun by the corporation, and an assignee was appointed. No possession was taken by the mortgagee of any personal property acquired by the corporation after making the mort-

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gage. *Held*, that the title to such after-acquired property passed to the assignee in insolvency. *Harriman* v. *Woburn Electric Light Co.* 86.

See ACTION, 1, 2; ASSAULT AND BATTERY; CHATTEL MORTGAGE; ESTOPPEL, 4; EXECUTION, 5; LIMITATIONS, STATUTE OF; PARTITION; PURCHASER WITHOUT NOTICE; SALE, 4; TENDER; TROVER, 3, 4; WAY, 9.

MOTIONS.

See EVIDENCE, 26; GRAND JURY, 3; INDICTMENT; NEW TRIAL, 2, 3.

MUNICIPAL CORPORATION.

See CITY; TOWN.

MUNICIPAL COURT.

See JURISDICTION; SUPERIOR COURT, 2.

NAME.

1. The provisions of Pub. Sts. c. 76, § 6, forbidding any person to "assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person" without written consent do not apply to advertising one's self as "formerly with" or "successor to" another. *Martin* v. *Bowker*, 461.
2. If a business originally carried on by A., and afterwards by A. and his son B. under the name of "A. & Son," is purchased by B. and carried on by him under the same name until his death, and is given by him by will including the goodwill and other assets to his wife, and by her sold to C., with the right so far as she has the power to give it to use the name and description "C., successor to A. & Son," C. is a "successor," and a bill in equity by the administrator of A. will not lie to enjoin him from using the name and description. *Ibid.*

See INJUNCTION, 1, 3; PARTNERSHIP, 2; TRADEMARK.

NEGLIGENCE.

1. A. entered into a written contract with a city for the construction of a sewer, according to plans and specifications which were furnished in advance for the entire work. A. was to do the work with his own men, and to have it done by a certain date. The work was to be done "to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times"; and the power to him or the inspector in charge of giving directions as to the work in certain particulars was provided for. The contract also provided that "none but citizens of" the city were "to be employed on this work." *Held*, in an action by an abutter against the city for trespass upon his land, that A. was an inde-

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pendent contractor, for the negligence of whose men in doing the work the city was not liable. *Harding* v. *Boston*, 14.

2. If, as a train is about to stop within the limits of a station, not to deliver passengers, but to allow another train to deliver its passengers, an unauthorized announcement of the station is made accompanied by a direction to "change" for another station, it is a question for the jury whether the fact that such a call has been publicly made does not impose upon the carrier a duty to give a counter warning that passengers are not yet to leave the train, and whether it may be found to be negligence on the part of the carrier to suffer a passenger to go upon the platform without warning, for the purpose of leaving the train under such circumstances. *Floytrup* v. *Boston & Maine Railroad*, 152.

3. If the plaintiff, a traveller in a buggy on the highway, through the negligence of the gate-keeper is shut within the gates of a railroad crossing, and while there is either thrown from his buggy by an approaching train or jumps out, he suffers a physical injury, though it consists mainly of a nervous shock, and in estimating the damages the jury may take into consideration the fright and the nervous shock. *Warren* v. *Boston & Maine Railroad*, 484.

4. Where it appears that the plaintiff, a traveller in a buggy on the highway, upon entering the crossing of the way by a railroad at grade, found the gates up, that he looked both ways, and heard no bell or whistle, that the first notice he had of danger was when the gates began to be lowered after he was part way across the tracks, that he got across the tracks and cried out to the gate-keeper to raise the gates, which the latter did not do, and that thereupon the plaintiff turned his buggy into the space between the outer track and the gate and it was there struck by an approaching train, and he was either thrown out or he jumped out, there is some evidence for the jury on the question of the due care of the plaintiff, and of the negligence of the gate-keeper, who was the servant of the railroad company, and a refusal to direct a verdict for the defendant affords no ground of exception. *Ibid.*

5. In an action against a railroad company by a traveller on the highway, who through the negligence of a gate-keeper was shut within the gates of a railroad crossing and injured by an approaching train, a request by the defendant for a ruling that "if the plaintiff knew or in the exercise of reasonable care might have known that the gates were descending or about to descend before he entered upon the crossing, but notwithstanding took the risk of entering upon the crossing, he cannot recover," was properly refused, since it did not assume that the plaintiff knew that the gates were descending or were about to descend, which in such a case is an essential element to justify the application of the doctrine of the assumption of the risk. *Ibid.*

6. The doctrine of the assumption of the risk, as distinguished from the doctrine of reasonable care, in actions not between master and servant or persons having contractual relations, is confined to cases where the plaintiff knew and appreciated the danger, and voluntarily put himself in the way of it. *Ibid.*

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7. In an action for personal injuries, it appeared that the plaintiff was employed as a deck hand on a barge owned by the defendant, which was fitted with a derrick and boom, block and falls, and a steam hoisting engine to operate the same; that another barge also belonging to the defendant came alongside with a load of spiles, which were to be transferred to the first named barge; that as the plaintiff was engaged in putting some boards over an iron casting on the deck near the bow of the boat, in accordance with directions of the captain, he was struck and injured by a spile which was being so transferred without the use of a guide rope, and which did not swing from the derrick as it was intended to, but caught in the boat's rigging and then swung against the plaintiff; that a warning was given him to look out just as he was struck, but he did not have time to avoid the blow; that he could have seen the spile before it struck him, if he had been looking for it; and that he had been employed on the boat for several years, and had seen similar work done there, a guide rope being sometimes but not always used. He testified that he knew they were going to lift the spile when they got ready, and every one was out of the way, but he did not suppose they were ready to start when they did. A witness testified that, from the time they began to fasten the spile to the derrick chain until the signal was given to hoist, it was two or three minutes, but the hoisting itself occupied about a second. *Held*, that it was a question of fact for the jury whether the plaintiff was in the exercise of due care. *Lang* v. *Terry*, 138.

8. In an action for personal injuries occasioned to the plaintiff by being shot by the defendant while they were on their way in the Maine woods to a hunting camp on a road bordered by woods and brush, it appeared that there was no reason to expect that any persons were in the vicinity except the party of which they were members, and that the members of the party rode or walked as they chose, those walking not always keeping together, and at a time when both the plaintiff and the defendant were on foot the plaintiff sat down alone in the woods a few feet from the nearest wheel rut and was shot by the defendant, who had discharged his rifle at a partridge, not knowing that the weapon was pointed toward the plaintiff. The defendant excepted because the plaintiff was permitted to introduce evidence that members of the party rested along the route, both in the road and off the road in the bushes, without direct evidence in every instance that it was done with the knowledge of the defendant. The evidence was conflicting as to whether there were bushes about the place where the plaintiff was sitting when the defendant fired, and the plaintiff testified that when he first saw the defendant approaching he did not appear to be about to shoot, and that on the instant after, upon seeing him raise the weapon, he cried out to him, "Don't shoot." *Held*, that the conduct of the members of the party with reference to keeping in or going out of the roadway might reasonably be expected to be the same at the time of the shooting as it had been during the journey, and that the jury might reasonably infer that, if members of the party rested outside of the roadway, that fact must have been observed by and become known to the defendant in the course of the journey, and that the evidence as to mem-

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bers so resting was relevant. *Held, also*, that the court could not rule, as matter of law, that the plaintiff was negligent, and that requests based upon the theory that, as matter of law, the plaintiff was not in the exercise of due care, were rightly refused. *Whitten* v. *Hartin*, 39.

See ACTION, 1, 2, 4–7; EMPLOYERS' LIABILITY ACT; EVIDENCE, 12-14, 16, 17, 30–33; EXCEPTIONS, 10; GRADE CROSSING, 1; HIGHWAY; INFANT; LIVERY STABLE; MASTER AND SERVANT; PARENT AND CHILD; PASSENGER, 2, 3; STREET RAILWAY; TRIAL, 8; WAY, 1, 8.

NEGOTIABLE INSTRUMENTS.

See CHATTEL MORTGAGE; PROMISSORY NOTE; SALE, 2.

NEW TRIAL.

1. If special findings of fact by a judge, trying a case without a jury, appear to have been made upon evidence to which no exceptions were taken, although the ultimate finding of the amount due must be set aside and a new trial had on the question of damages, it is not necessary that the special findings should be set aside also. *Browning* v. *Carson*, 255.
2. While a judge, in acting upon a motion for a new trial of an action, must conform to the rules of the court and to the settled principles of law, the pendency of such a motion does not annul or suspend his power upon his own motion to set aside the verdict and order a new trial "for any cause for which a new trial may by law be granted," under Pub. Sts. c. 153, § 6. *Ellis* v. *Ginsburg*, 143.
3. If a motion to set aside the verdict in an action because contrary to the evidence could not be granted, for the reason that a rule of the court had not been complied with, and another motion to set aside the verdict because of newly discovered evidence could not be granted, for the reasons that the evidence was not in the legal sense newly discovered, or was cumulative, or was in contradiction of the moving party and his other witnesses, or because the failure to produce it at the trial was not accounted for or excused, or for other like reasons, nevertheless, if in dealing with those motions the judge became convinced that legal grounds existed for ordering a new trial, and for that reason alone set the verdict aside and ordered a new trial, if he had evidence before him from which he could find facts which made a "cause for which a new trial may by law be granted," under Pub. Sts. c. 153, § 6, it is immaterial how he may have ruled in answer to the requests made in the hearing of the motions. *Ibid.*
4. A new trial of an action "may by law be granted," under Pub. Sts. c. 153, § 6, where the court is satisfied that, by reason of some accident, mistake, or misfortune in the conduct of the trial, a new trial is necessary to prevent a failure of justice. *Ibid.*

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NOTICE.

See ATTACHMENT; CITY, 3; EMPLOYERS' LIABILITY ACT, 5; EVIDENCE, 2; EXECUTION, 3, 4; MECHANIC'S LIEN, 1; NEGLIGENCE, 2; POOR DEBTOR, 4; PROMISSORY NOTE, 1, 3; PURCHASER WITHOUT NOTICE; REDEMPTION; SALE, 1, 3; SUMMARY PROCESS FOR RECOVERY OF LAND; TRIAL, 3; WAY, 5.

NUISANCE.

See DRAIN, 1; ESTOPPEL, 1, 2; TRIAL, 5.

OFFICER.

See EXECUTION, 1, 3–6; PUBLIC OFFICER.

OLEOMARGARINE.

Oleomargarine artificially colored by annatto so as to cause it to look like yellow butter produced from pure unadulterated milk, or cream from the same, is within the prohibition of St. 1891, c. 58, § 1, which statute has not been repealed, and is constitutional and valid as applied to oleomargarine so colored. *Commonwealth* v. *Kelly*, 169.

ORDINANCE.

See STREET RAILWAY, 2.

PARENT AND CHILD.

A boy two years and eight months old lived with his parents in a house on a place, so called, about two hundred feet distant from a street upon which an electric railway ran. There was a yard outside of the house enclosed by a fence with a gate opening from it into the place, and on the gate was a catch to fasten it, and also a rope, sometimes used for the same purpose. There were older children in the family, who attended school, and who had been instructed to fasten the gate whenever they passed in or out. One of them, a girl seven years old, who once had been punished by her mother for leaving the gate open, went out of the house after dinner into the yard on her way to school, and left the gate open as she passed out. The boy followed her from the house into the yard, and went out upon the street, where he was run over and killed by an electric car. His mother, who was engaged in her household work, saw him follow his sister out of the house, and learned of the accident ten or fifteen minutes afterwards. *Held*, in an action against the railway corporation for causing his death, that it was a question of fact for the jury whether the mother was reasonably careful in allowing the boy to go out into the yard alone, and in not watching him after he went out. *Powers* v. *Quincy & Boston Street Railway*, 5.

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PARK.

See PUBLIC CHARITY, 2.

PARTIES.

See ACTION, 1, 2; BOSTON, 3; CONTRACT, 1, 2; CORPORATION, 1; INSANITY; INTERPLEADER.

PARTITION.

A petition for partition of land will not lie if the mortgagee thereof has entered for condition broken, and is in actual possession of the premises at the time of the filing of the petition. *O'Brien* v. *Bailey*, 325.

PARTNERSHIP.

1. The reception of property of a partnership from one of the partners in payment of his personal debt, without the consent of his copartner, is a fraud upon the partnership and is void against the other partner, and the latter, having succeeded to all the rights of the assignee in insolvency and of the firm, is free from the embarrassment which would attend an attempt by the members of the firm to maintain an action jointly in their own names, and may, under Pub. Sts. c. 157, § 109, recover the full amount of the debt, as the assignee could have done if it had not been sold. *Brickett* v. *Downs*, 70.
2. The plaintiff in a suit in equity against A. and B. was formerly in partnership with A., carrying on a law and collection business under the name of "F. & C.," each owning a one-half interest in the firm. The plaintiff conveyed to A. the former's one-half interest "in the business of law and collections of the firm of F. & C.," except as stated in an instrument of even date signed by the two, reserving to himself "the name 'F. & C.' excepting as agreed in said" instrument. In that instrument, A. conveyed to the plaintiff "all his right and interest in the name F. & C.," and reserved "the right only to advertise he was lately of said firm, and to indorse checks in that name for collection or deposit only that pertain to business now in the hands of F. & C. or their correspondents, and to collect bills now due said firm"; and agreed to vacate the office occupied by the firm by a day named, and assign his interest in the lease to the plaintiff, who retained the office. The instrument further provided that all cases pending in court should remain in the plaintiff's charge, "subject to the right of the clients." A. immediately took another office in the same building, and entered into partnership with B., an attorney at law, who had formerly been employed by F. & C. *Held*, that A. and B. had no right to advertise that they were the successors of F. & C. *Held*, *also*, that it was a violation of the agreement between the plaintiff and A. for the latter

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or his firm to solicit clients who had pending cases to withdraw them from the plaintiff's control, and to turn over the management of them to B. *Holbrook* v. *Nesbitt*, 120.

See EQUITY, 3–6; ESTOPPEL, 3; INJUNCTION, 1, 3; NAME, 1; TAX, 2.

PASSENGER.

1. Tendering a coupon from a season ticket not good for his ride does not relieve a passenger from paying his fare in cash, although on previous occasions such coupons have been accepted for such rides, and although he may have been told by brakemen or gatemen that the train was a train for his station, or, upon a former occasion, that his ticket was good for passage by that train. *New York & New England Railroad* v. *Feely*, 205.
2. One who, without the knowledge of any of the trainmen or servants of a railroad corporation, endeavors to get upon a train which has stopped for the purpose of discharging passengers at a station where it is not accustomed to stop for the purpose of receiving them, does not thereby become nor acquire the rights of a passenger, although he has a ticket, and cannot recover damages from the corporation for an injury caused by the sudden starting of the train while he is so endeavoring to get upon it; no negligence on the part of the corporation's servants being shown. *Jones* v. *Boston & Maine Railroad*, 245.
3. If a person who enters an electric car, the seats of which are all occupied by passengers, stands upon the step of the car, without objection by the conductor, who collects a fare of him, and while the car is passing over a double curve in the tracks the motorman increases its speed, and in consequence thereof the passenger is thrown off and injured, the question of his due care is rightly submitted to the jury; and it cannot be said, as matter of law, that because he did not crowd upon the platform through and against the passengers, as there was testimony that he might have done, he is precluded from recovering. *Wilde* v. *Lynn & Boston Railroad*, 533.

See ACTION, 6; EVIDENCE, 11–14; NEGLIGENCE, 2.

PATENT.

See TRADEMARK.

PAUPER.

See ACTION, 3.

PAYMENT.

It is no defence for a debtor, who is sued to recover a sum of money, that he has voluntarily paid the sum to a creditor of the plaintiff, unless such

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payment was authorized or assented to by the plaintiff. *Harrison* v. *Moran*, 495.

See CONTRACT, 1, 6; DAMAGES, 2; EVIDENCE, 7; HUSBAND AND WIFE, 4; INTEREST, 1, 2; PARTNERSHIP, 1; PASSENGER, 1; PROMISSORY NOTE, 2; SALE, 2, 4, 5; TRUSTEE PROCESS; WAIVER.

PENALTY.

See CONTRACT, 4.

PERPETUITY.

See TRUST AND TRUSTEE, 2, 4.

PERSONAL PROPERTY.

See CHATTEL MORTGAGE; MORTGAGE; SALE; TENDER.

PETITION.

See AMENDMENT; PARTITION; TOWN, 3, 4.

PHOTOGRAPH.

See DEVISE AND LEGACY, 3.

PHYSICIAN.

See INSURANCE, 3.

PLAN.

See EVIDENCE, 10.

PLEADING.

See ABATEMENT; ADULTERY, 1; ANSWER; CORPORATION, 1; DECLARATION; DEMURRER; ESTATES OF PERSONS DECEASED, 1; INDICTMENT; MASTER AND SERVANT, 3, 4.

POLICE OFFICER.

See GRAND JURY, 1, 3.

POLYGAMY.

An honest or reasonable belief in the death of a former husband or wife is not, in this Commonwealth, a defence to a prosecution for polygamy. *Commonwealth* v. *Hayden*, 453.

See EVIDENCE, 4; MARRIAGE, 3.

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POOR DEBTOR.

1. After a poor debtor has invoked the protection of Pub. Sts. c. 162, § 38, and agreed to submit to an examination, he cannot, without a breach of his recognizance, when he appears at the place and time and before the court which he has selected, decline to submit to such examination because the court has refused his request for a continuance, and the facts that the court thereafter proceeded to refuse to administer the oath and ordered the clerk to affix to the execution a certificate authorizing the commitment of the debtor, and that the execution was not produced, are immaterial. *Damon* v. *Carrol*, 404.
2. The fact that, at the commencement of an action upon a poor debtor's recognizance, the execution on which he was arrested had not been returned into court, is no bar to the action. *Chesebro* v. *Barme*, 79.
3. In an action upon a poor debtor's recognizance, the question whether a trial justice court is a court of record is immaterial. *Ibid.*
4. If, at the time and place appointed by a trial justice for the hearing of a person who has applied to take the oath for the relief of poor debtors, the debtor and creditor both appear, but the magistrate fails to appear, and the debtor does not procure within the hour the attendance of some other duly qualified official to adjourn the hearing, or himself give a new notice within three days of his intention to submit himself to examination, as provided by St. 1887, c. 442, § 8, there is a breach of his recognizance; and St. 1889, c. 415, does not relieve the debtor of the obligation to secure a proper continuance, if no person qualified to conduct the examination appears. *Ibid.*
5. A poor debtor recognizance, requiring the principal defendant to deliver himself up "for examination before some magistrate authorized to act," is to be construed as if it required the debtor to deliver himself up for examination before some court or magistrate named in St. 1888, c. 419. *Boston Wall Paper Co.* v. *Mullen*, 20.

See Action, 3; Execution, 2-6.

POST OFFICE.

See Execution, 3.

POWER OF ATTORNEY.

See Corporation, 3.

PRACTICE.

See Abatement; Answer; Constitutional Law, 1; Damages, 1; Declaration; Demurrer; Equity, 8–10; Estates of Persons Deceased; Evidence, 2, 5, 6; Exceptions; Execution; Grade Crossing, 2, 3; Grand Jury; Indictment; Insolvent Debtor;

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INTERROGATORIES TO ADVERSE PARTY; MALICIOUS PROSECUTION, 2, 3; MASTER AND SERVANT, 3, 4; MECHANIC'S LIEN, 3; NEW TRIAL; PARTITION; POOR DEBTOR; RECEIVER, 1; REPLEVIN; SUPERIOR COURT; TOWN, 4; TRIAL; TROVER; VERDICT; WAIVER; WITNESS; WRIT OF REVIEW.

PRESCRIPTION.

See WAY, 1-7.

PRESUMPTION.

See FOREIGN LAW; WAY, 3.

PRINCIPAL AND AGENT.

See ACTION, 4; ASSAULT AND BATTERY; CHATTEL MORTGAGE, 2; CITY, 1; CONTRACT, 3; CORPORATION, 2, 3; DAMAGES, 3; EVIDENCE, 1; PASSENGER, 1; TENDER; TOWN, 1; TRESPASS; TRIAL, 3.

PROBABLE CAUSE.

See EXCEPTIONS, 8.

PROBATE COURT.

See ESTATES OF PERSONS DECEASED, 3, 5; LIMITATIONS, STATUTE OF.

PROMISSORY NOTE.

1. If no demand is made on the maker of a promissory note at its maturity, and no notice of its non-payment is given to the indorser, the latter is not liable to an action thereon. *Browning* v. *Carson*, 255.
2. If a promissory note is given to a corporation in part payment of land, which the corporation agrees by an instrument of even date to convey to the maker by a good and sufficient deed on payment of the note, and before the maturity of the note the corporation executes a trust deed of all its real estate, including that sold to the maker of a note to secure the payment of bonds which are issued and sold, there is a total failure of the consideration for the note, and no action can be maintained thereon by the corporation against the maker. *Fort Payne Coal & Iron Co.* v. *Webster*, 134.
3. At the trial of an action upon a promissory note, the testimony of the defendant, who was the maker, was that he gave the note, which was made payable to his own order, to a broker at the broker's request, and under an agreement with him that he should not use it or negotiate it unless the defendant failed to keep his margin good upon stocks bought for him by the

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broker, or he became indebted to the broker, and not then unless the broker first notified him and gave him a chance to make his margin good or to pay such indebtedness. The broker pledged the note before maturity to the plaintiff, as collateral security for the payment of a pre-existing debt. *Held*, that the note was taken for value, but that, if it was fraudulently put into circulation, the burden was upon the plaintiff to show that it took the note for value before maturity and without notice or knowledge of the fraud. *National Revere Bank* v. *Morse*, 383.

See ADMINISTRATOR, 2; CHATTEL MORTGAGE; CONTRACT, 6; EVIDENCE, 7; HUSBAND AND WIFE, 2–4; PUBLIC CHARITY, 3, 4; SALE, 2, 4.

PUBLIC CHARITY.

1. A devise of "The Chapel lot . . . to be retained and used when the growth of the village population will justify the building of a larger and more pretentious Village Chapel," and bequest of a sum of money for the purpose ultimately of erecting upon the Chapel lot a chapel to be used by the inhabitants of the village for religious meetings and a Sunday School, are good public charitable gifts. *Bartlett, petitioner*, 509.
2. A gift of real and personal property for a public park is a good public charitable gift. *Ibid.*
3. A testator by his will gave in trust the sum of one hundred and twenty thousand dollars, including a note of twenty thousand dollars held on demand, the income "to be paid semi-annually to the Board of Trustees of the Gloucester Lyceum, and Sawyer Free Library as part of the endowment fund for its support." About five years before the execution of the will the testator delivered to the treasurer of the Lyceum and Library, a corporation, a promissory note for twenty thousand dollars, signed by him and payable on demand to the order of the Board of Trustees of the corporation with interest, which interest was paid by him to the time of his death. *Held*, that the note, being signed by the testator, could not be the subject of a gift; that it was simply a written promise, without consideration, and could not be enforced against his estate; that the language of the will showed that the bequest was of the sum of $120,000, of which the promise contained in the note should be a part; that the note should be cancelled; and that the bequest of $120,000 was a good public charitable bequest. *Ibid.*
4. A bequest "of Forty Thousand Dollars, in trust, including the notes of Two Thousand Dollars, already given," the income to be paid "to the Treasurer of the Female Charitable Association of Gloucester, . . . to be devoted to the charitable and benevolent objects for which this society has so long and so cheerfully labored, relieving the destitute and comforting the sick," is a good public charitable bequest of forty thousand dollars; and the notes signed by the testator cannot be the subject of a gift, and, being simply written promises, without consideration, cannot be enforced against his estate, and must be cancelled. *Ibid.*
5. A bequest to the government of a city of money in trust to be called the

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"S. Drawing and Music Fund, and the income only to be used to assist in defraying the expenses of competent teachers in these two departments of our Public Schools under the direction of the School Committee," and if either or both should be discontinued "the income shall then be used to establish a branch or Nautical School, to teach young mariners the art or science of Navigation," is a good public charitable bequest. *Bartlett, petitioner*, 509.

6. A bequest to the government of a city of money in trust, the income to be applied by the School Committee in providing medals for meritorious scholars in the High and Grammar Schools, and to be used in setting out ornamental trees on the waysides, or within the school-house grounds or other public places, is a good public charitable bequest. *Ibid.*

7. A bequest of money to the Trustees or the Treasurer of a Public Library in trust to be called the "S. Fund," the income to be used for books, is a good public charitable bequest. *Ibid.*

8. Bequests of money to the Parish Committee and the Treasurer of the First Parish Unitarian Society of a city in trust, the first to be called "Parsonage Fund," the income to "be allowed to accumulate until such time as the said officers and the members of said Society shall deem it best, to provide a parsonage Home for their minister," the second to be called the "Salary Fund, the income only to be used in paying the minister's salary," the third without any particular name, "the income only to be used in purchasing Sabbath School books," and the fourth to be called the "Girls' Industrial School Fund," the income "to be paid to the chief manager of said School," are all good public charitable bequests. *Ibid.*

See TRUST AND TRUSTEE, 5.

PUBLIC LIBRARY.

See PUBLIC CHARITY, 3, 7.

PUBLIC OFFICER.

The due authority of one acting *de facto* in an official capacity may be inferred when there is no evidence that he has usurped his office. *Damon* v. *Carrol*, 404.

See BOSTON; CITY, 3.

PURCHASER WITHOUT NOTICE.

A person, who acts upon an incorrect statement by a stranger of the effect of a deed capable of two meanings, is not thereby, without more, in the position of having acted in good faith upon a possible interpretation after reading the instrument. *Usher* v. *Raymond Skate Co.* 1.

See INSOLVENT DEBTOR, 8; SALE, 1, 3.

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QUO WARRANTO.

See CONSTITUTIONAL LAW, 1.

RAILROAD.

See EMPLOYERS' LIABILITY ACT, 6, 7; EVIDENCE, 8–14; EXCEPTIONS, 10; GRADE CROSSING; NEGLIGENCE, 2–5; PASSENGER, 1, 2; RAILROAD COMMISSIONERS; STREET RAILWAY; WAY, 1, 2, 5, 7, 8.

RAILROAD COMMISSIONERS.

A statute required a railroad corporation to operate a ferry between a city and a town named, and provided that the corporation should "forfeit to the Commonwealth one hundred dollars a day for each day's delay in operating such ferry" after a day named, "or after the expiration of such further time as the railroad commissioners may upon hearing prescribe," and that this court should have jurisdiction in equity, upon a petition of ten or more citizens of the city or town named, to enforce the provisions of the statute. The railroad corporation failed to comply with the statute, and a petition in equity was filed as therein provided. Two months after the time limited in the statute, the corporation requested the railroad commissioners, after a hearing, to "prescribe such further time for delay in operating" the ferry as might appear to the commissioners to be reasonable. The commissioners thereupon, after a hearing, passed an order, naming a day six months later than that named in the statute "as the day after which, instead of after the" other day, the corporation should "forfeit to the Commonwealth one hundred dollars a day for each day's delay in operating" the ferry, "with leave to the petitioner to apply for further postponement of time." *Held*, upon a petition by ten citizens of the city and town named for a writ of certiorari to quash the order, that the statute was intended to give the railroad commissioners power to grant further time to the corporation on a petition filed after the day named in the statute; that the order of the commissioners was to be construed, not as relating solely to forfeitures, but as granting delay in operating the ferry for all purposes up to the extended day named, and, so construed, it was within the authority intended to be given to the commissioners; and that the petition for certiorari must be dismissed without prejudice to the other proceedings. *Brownell* v. *Railroad Commissioners*, 276.

RATIFICATION.

See ADMINISTRATOR, 2; CITY, 1, 2; CONTRACT, 3; TOWN, 1.

REAL ESTATE.

See CONTRACT, 5, 6; EMINENT DOMAIN; EVIDENCE, 3, 7, 18–22; EXECUTION, 3–7; INFANT, 2; MECHANIC'S LIEN; MORTGAGE; NEGLIGENCE, 1; PARTITION; PROMISSORY NOTE, 2; SALE, 3, 4; SUMMARY PROCESS FOR RECOVERY OF LAND; TAX, 1; TRUST AND TRUSTEE, 1–3.

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RECEIVER.

1. An appointment of a receiver of a corporation does not, apart from a statute or an order of court, make him so far the representative of the corporation that he can bring suits for it in his own name, or bind it by admissions *in pais* made outside of the performance of his official duties. *Fort Payne Coal & Iron Co.* v. *Webster*, 134.

2. If a receiver of an insolvent corporation takes possession of its leasehold estate, he is liable only for a reasonable rent during the time that he retains possession; and he does not become an assignee of the term, and is not liable on the covenants of the lease. *Bell* v. *American Protective League*, 558.

See EVIDENCE, 7; MORTGAGE, 2.

RECOGNIZANCE.

See ACTION, 3; POOR DEBTOR.

RECORD.

See ATTACHMENT; ESTATES OF PERSONS DECEASED, 3; EVIDENCE, 5; EXECUTION, 7; GRAND JURY, 3; HUSBAND AND WIFE, 1, 2; MARRIAGE, 2; MORTGAGE, 1; POOR DEBTOR, 3; REPLEVIN.

REDEMPTION.

When land is sold for taxes assessed to one not the owner, without the knowledge of the latter and without notice to him of the assessment or demand upon him for payment, his subsequent grantee and he, as mortgagee back of such grantee, may, under St. 1888, c. 390, § 57, upon tender of the sum required by law within two years after actual notice of the sale, jointly maintain a bill to redeem the land from such sale, and from a judgment for possession rendered against the grantee on a writ of entry brought by the purchaser at the sale. *Stone* v. *Stone*, 474.

REGISTER OF PROBATE.

See ESTATES OF PERSONS DECEASED, 3.

REGISTRY OF DEEDS.

See ATTACHMENT; MORTGAGE, 1.

RELEASE.

See CORPORATION, 3.

RELIGIOUS SOCIETY.

See PUBLIC CHARITY, 1, 3.

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REMAINDER.

Where a will provides that property in the hands of trustees is to be by them paid over at a future date, discharged of all trust, to those persons who at that time shall be the testator's legal representatives, that is, to those who will be entitled to succeed to personal estate in case of intestacy, a contingent and not a vested remainder is created. *Eager* v. *Whitney*, 463.

RENT.

See LANDLORD AND TENANT, 2.

REPLEVIN.

In an action of replevin, the judge, on March 9, 1894, found for the defendant, and by his direction the clerk made on the docket a memorandum of the finding. Twenty days thereafter a motion was made for the return of the goods and the assessment of damages, and the finding was amended by adding "and for the return of goods." The assessment of damages was postponed until the following June, neither party objecting, but the plaintiff not consenting, except by silence. In July following, when the question of assessment of damages was argued, the plaintiff objected, on the ground that the judge had then no authority to assess them. The judge overruled the objection, and assessed damages on July 25 as of the preceding March 29; and the plaintiff excepted. *Held*, that the original docket entry was in the nature of a memorandum rather than of a final judgment, and that it was competent for the judge at a later stage, upon motion of the defendant, to order a return and assess the damages. *Ashcroft* v. *Simmons*, 437.

See EVIDENCE, 24; EXCEPTIONS, 7; JURISDICTION; WAIVER.

RESCISSION.

See CONTRACT, VI; DECEIT, 2.

RESERVATION.

See WAY, 2, 9.

RESTRICTION.

A piazza, covered by its own roof, and attached to the front of a house the front line of which is twenty feet from the street, is a "building" within the terms of a restriction that "no building . . . shall be placed at a less distance than twenty feet from" the street. *Reardon* v. *Murphy*, 501.

RETURN.

See CITY, 3; REPLEVIN.

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SALE.

1. If a contract under which personal property is delivered passes no title until a certain condition is performed, the vendor, in the absence of such performance, if guilty of no laches, may reclaim the property, even from one who has purchased from the vendee in good faith and without notice. *Wentworth* v. *Woods Machine Co.* 28.

2. A. bought certain machines of a corporation under written instruments, reciting that he had "borrowed and received" of the corporation the machines, the price of which was stated, and containing the following provisions: "If the price set against them is paid as per memorandum in the margin, the property is then to belong to such borrower, otherwise it remains the property of" the corporation. "Notes and drafts, if given, are not to be considered as payments until they are paid, and all part payments are to be forfeited by non-payment of the balance at the time stated. . . . And said borrower agrees to pay such price as per memorandum." They also contained a "memorandum of payments to be made," consisting of one cash payment and the balance in a series of promissory notes. A. gave the corporation the notes called for by the terms of the instruments, some of which were paid at maturity, and others were not, and upon the latter he made small payments in cash at different times and gave renewal notes for the balance, and these latter notes were themselves renewed several times in many instances, the amounts thereof being reduced by partial cash payments; and these payments were applied to the notes falling due without regard to the particular instrument. The corporation wrote to him frequently, urging payment of amounts overdue, but never made any claim under the forfeiture clause in the instruments. A. died, owing a large sum on the notes thus given. *Held*, that these facts warranted a finding that the corporation did not waive the condition of the instruments, and that the condition was not performed. *Ibid.*

3. If a machine delivered under a contract which passes no title until a certain condition is performed is of such a character, and if, with the knowledge and consent of the vendor, it is affixed to real estate in such a manner and under such circumstances, as would make it a part of the realty according to the rules applied between grantor and grantee, and if a third person acquires a title to the real estate without notice of the title of the vendor of the machine by reason of non-performance of the condition of sale, the machine will belong to such purchaser of the real estate under his deed. *Ibid.*

4. A. bought certain machines of B. under contracts called leases, containing a condition that the title should not pass until the purchase money was all paid. At the time of the purchase, and for a long time afterwards, A. was only a tenant of the building in which the machines were placed, which was used by him as a planing mill. He got them insured as personal property, and the insurance was made payable to B. as his interest might appear. A. became insolvent before he had paid for the machines, and in the insolvency proceedings B. was included in the list of creditors, and his debt was alleged to be secured by leases. Previously to A.'s in-

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solvency, the real estate on which the mill stood was conveyed to him, he giving to the grantor his promissory note in part payment of the purchase price, and a mortgage on these machines as personal property to secure the payment of the note. The machines rested on the floor, and were fastened merely by screws through holes in the legs for the purpose of steadying them; they were of a regular stock pattern, they could be removed without injury to the building, and they were suitable for use in any other planing mill. *Held*, upon an appeal from the decree of a single justice dismissing a bill in equity, brought by one acquiring title to the real estate to restrain B. from taking the machines under his leases, that a finding that the machines had not become a part of the realty was warranted by the evidence. *Wentworth* v. *S. A. Woods Machine Co.* 28.

5. A. bought certain machines of B. under contracts called leases, containing a condition that the title should not pass until the purchase money was all paid. He became insolvent, and died before he had paid for the machines. *Held*, that the administrator of A.'s estate should not be ordered to pay B. the sum due him under his leases. *Ibid.*

See Auction; Corporation, 1; Damages, 2, 3; Evidence, 24; Expert; Insolvent Debtor, 8; Intoxicating Liquors, 3–5; Malicious Prosecution, 2; Partnership, 2.

SCHOOL.

See Public Charity, 5, 6, 8.

SEPARATE SUPPORT.

See Insolvent Debtor, 5.

SERVICE.

See Execution, 1, 3, 4.

SET-OFF.

See Administrator, 1; Evidence, 19.

SEWER.

1. So far as an assessment, under Pub. Sts. c. 50, § 7, for the cost of constructing a sewer is concerned, it is unnecessary that the laying out of the sewer should be before its construction. *Slocum* v. *Brookline*, 23.
2. A way in a town was laid out and wrought as a private way, and a sewer was constructed through it by the owners of the land. Houses were built on abutting lots, and drains were laid from them connecting with the sewer. The owners of the way and of the sewer obtained permission from the selectmen of the town to enter the sewer into a larger one, which

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was a part of the general system of sewers in the town, under an arrangement that, if the sewer should not afterwards be laid out by the town, the right of drainage should be on such terms as the selectmen might impose. Afterwards the way was laid out as a public way by the selectmen, and their action was duly adopted by the town. Previously to the laying out it was agreed between the selectmen and the owners of the way and of the sewer that the town should pay the owners the actual expenses which had been incurred in constructing the sewer. The owners then made deeds of release of the land included in the way and of the sewer laid therein, and the town paid them the cost of constructing the sewer, and adopted the sewer as a part of its system of sewers. These agreements and transactions between the owners and the selectmen were in accordance with a long established practice of the town in similar cases. *Held*, that there was such a laying out of the sewer as made it one of the town's sewers, and subjected the land abutting on the street to assessment under Pub. Sts. c. 50, § 7. *Slocum* v. *Brookline*, 23.

8. The fact that abutters on a private way in a town bought houses and lots with drains running into the sewer which had been constructed in the way by the owners thereof, does not affect the right of the selectmen to lay an assessment, under Pub. Sts. c. 50, § 7, in favor of the town, after the purchase of the sewer by the town from the owners of it, if it does not appear that such abutters had acquired any rights, as against the owners of the fee, which would prevent the sale of the sewer to the town. *Ibid.*

See Drain; Evidence, 20, 21; Negligence, 1; Town, 1; Trespass.

SHIPS AND SHIPPING.

See Evidence, 32, 33; General Average; Negligence, 7.

SIDEWALK.

See Street Railway, 1.

SPECIFIC PERFORMANCE.

A lease for less than seven years of part of a basement in an uncompleted building contained a covenant "to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises." The building was completed, but the lessor and his assignee refused to put into the premises apparatus sufficient to heat and light them, or to deliver them to his lessee. *Held*, on demurrer to a bill for specific performance, that the contract was sufficiently certain; that superintending the completion of the apparatus was not more than a court of equity would undertake; that the covenant required the apparatus to be on the premises at the moment of delivery; that, as the lease was not required to be recorded, (Pub. Sts. c. 120, § 4,) the assignment of it did not authorize the assignee

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to prevent the performance of the covenant, whether he had notice of it or not; and that whether the burden of the covenant passed to him or not, under St. Hen. VIII. c. 34, § 2, (as to which *quære*,) the assignment did not discharge the covenantor. *Jones* v. *Parker*, 564.

See TRUST AND TRUSTEE, 1.

STATUTE.

See ACTION, 3, 4; AMENDMENT; ANSWER; ASSAULT AND BATTERY; BOSTON, 1, 2; CITY, 3; DEVISE AND LEGACY, 1; DRAIN, 3; ELECTIONS; EMINENT DOMAIN; EMPLOYERS' LIABILITY ACT; EQUITY, 3–5; EVIDENCE, 20, 21; EXCEPTIONS, 2; EXECUTION, 3, 4; GRADE CROSSING; HUSBAND AND WIFE, 1, 2; INDICTMENT, 1; INSOLVENT DEBTOR, 1–5; INSURANCE, 1, 2; INTEREST, 2; INTERROGATORIES TO ADVERSE PARTY; INTOXICATING LIQUORS, 1; LIBEL; LIMITATIONS, STATUTE OF; MARRIAGE, 3; MASTER AND SERVANT, 3, 4; MECHANIC'S LIEN; MORTGAGE, 1; NAME, 1; NEW TRIAL, 2–4; OLEOMARGARINE; PARTNERSHIP, 1; POOR DEBTOR, 1, 4, 5; RAILROAD COMMISSIONERS; REDEMPTION; SEWER; SPECIFIC PERFORMANCE; STREET RAILWAY, 2; SUMMARY PROCESS FOR RECOVERY OF LAND; SUPERIOR COURT, 1; TAX, 2; TENDER; THREAT; TOWN, 2–4; TRADEMARK, 3; TRIAL, 1; TRUST AND TRUSTEE, 1; WILL.

STATUTE OF FRAUDS.

See WILL.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED, EXPOUNDED, ETC.

ENGLISH STATUTES.

18 Edw. I.	Quo Warranto	450
32 Hen. VIII. c. 34, § 2.	Lease	568
4 & 5 W. & M. c. 18.	Quo Warranto	450
9 Anne, c. 20.	" "	448
47 & 48 Vict. c. 61, § 15.	" "	449

PROVINCIAL STATUTES.

1711–12, c. 6, § 4.	Intoxicating Liquor	472
1776–77, cc. 14, 46.	Act for regulating Monopolies, etc.	592

REVISED STATUTES OF THE UNITED STATES.

§§ 4501–4612.	Seamen	593

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STATUTES OF THE COMMONWEALTH.

1786, c. 68, §§ 2, 3, 8.	Intoxicating Liquor	472
1798, c. 77, § 4.	Execution	148
1824, c. 44.	Hamilton Manuf. Co.	594
1832, c. 166, § 10.	Intoxicating Liquor	472
1837, c. 242, § 3.	" "	472
1838, c. 163, § 5.	Insolvency	531
—— ——— § 19.	"	253
—— ——— §§ 19, 20, 21.	"	172
1844, c. 178, § 9.	"	253
—— ——— §§ 9, 12.	"	172
1845, c. 64.	Trust	504
1851, c. 189, §§ 2, 3.	Insolvency	173
—— c. 233, §§ 55–64.	Quo Warranto	446
—— c. 327, § 17.	Insolvency	253
—— ——— §§ 17, 18.	"	175
1852, c. 312, §§ 42–50.	Quo Warranto	446
—— c. 322, §§ 4, 11.	Intoxicating Liquor	472
1854, c. 448, § 33.	Boston	36
1856, c. 284, § 25.	Insolvency	254
1861, c. 152.	Insurance	112
—— c. 167, § 3.	Tax	285
1863, c. 172.	Lowell Horse Railroad	443
1864, c. 196.	Insurance	112
—— c. 261.	Lowell Horse Railroad	443
1868, c. 141, §§ 2, 9, 14, 23.	Intoxicating Liquor	472
1869, c. 111, § 1.	Sewer	309
—— c. 378.	Malden and Melrose	309
—— ——— § 3.	" "	310
1873, c. 171.	Lowell Horse Railroad	443
—— c. 331, § 1.	Insurance	113
1874, c. 221.	Hours of Labor	594
1875, c. 99, §§ 4, 12.	Intoxicating Liquor	472
—— c. 147.	Lowell Horse Railroad	443
1878, c. 157, § 1.	Insurance	112, 118
1879, c. 245.	Insolvency	561
1880, c. 175.	Insurance	113
1881, c. 166, § 1.	"	113
—— c. 207.	Execution	148
1882, c. 154.	Public Park	514
—— c. 164.	Mayor and Aldermen	36
1883, c. 223.	Equity Jurisdiction	560
—— ——— § 14.	" "	397
1884, c. 236.	Insolvency	178
—— c. 285.	Equity	128
—— c. 309, §§ 15, 23.	Waltham	345
1885, c. 266.	Boston	35

Digitized by Google

1885, c. 266, §§ 1–5, 6.	Boston	36
—— —— § 5.	"	456
—— —— §§ 10, 12.	"	38
—— c. 353, § 1.	Insolvency	27
—— c. 355.	Tax	284
—— c. 384, § 1.	Practice	475
—— —— § 2.	"	349
1886, c. 56.	Returns of Assessors	284
—— c. 322.	Insolvency	255
1887, c. 86.	Tax	284
—— c. 182.	Lowell Horse Railroad	443
—— c. 206.	Intoxicating Liquor	472
—— c. 214, § 21.	Insurance	111, 118
—— —— c. §§ 59, 60.	"	113
—— c. 270.	Employers' Liability Act	150, 156, 218, 224, 344
—— —— § 1, cls. 1, 2.	" " "	365
—— —— § 3.	" " "	108
—— c. 338, § 2.	Board of Health	240
—— c. 340, § 1.	Insolvency	254
—— c. 435, § 1.	Habitual Criminal	228
—— c. 442, § 3.	Poor Debtor	84
1888, c. 67.	Insolvency	532
—— c. 372.	Will	327
—— c. 388.	Interest	323
—— c. 390, § 57.	Tax	476
—— c. 393.	Insolvency	87
—— c. 419.	Poor Debtor	20, 407
1889, c. 108.	Sewer	241
—— c. 302, § 3.	Newton	321
—— c. 406.	Insolvency	178
—— c. 415.	Poor Debtor	84
—— c. 439.	Metropolitan Sewerage Act	386, 508
1890, c. 127.	Tax Appeal	283
—— c. 132.	Sewer	241
—— c. 163.	Lowell Horse Railroad	443
—— c. 173, § 1.	Railroad	133
—— c. 270.	Metropolitan Sewerage Act	386
—— c. 321, § 1.	Insolvency	253
—— c. 428, § 4.	Railroad	356
1891, c. 58, § 1.	Oleomargarine	169
—— c. 125, § 1.	Weaving Fines	594
—— c. 370, §§ 1, 3, 13.	Gas	347
—— c. 415, § 3.	Appeal	272
1892, c. 191.	Mechanic's Lien	8
—— c. 314, § 2.	City Registrar of Boston	456
—— c. 433.	Railroad	357
—— c. 435.	Beneficiary Association	560

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1893, c.	Railroad	357
—— c. 417, §§ 78, 321.	Election	539
—— —— § 147.	"	423
—— c. 460.	Board of Health	241
1894, c. 139.	Insolvency	177
—— c. 261.	"	253
—— c. 351.	Fall River Board of Police	473
—— —— § 2.	" " "	471
—— c. 392.	Old Colony Railroad	281
—— c. 428, § 4.	License Commissioners	472
—— c. 522, § 21.	Insurance	111, 118
—— —— §§ 59, 60.	"	113
1895, c. 343.	Fall River Board of Police	473

REVISED STATUTES.

c. 2, § 6, cl. 13.	Statute	253
c. 4, § 6.	Election	543
c. 47, §§ 5, 8.	Intoxicating Liquor	472
c. 73, § 39.	Execution	149
c. 81, § 5.	Supreme Judicial Court	446
c. 125, § 17.	Threatening to accuse of crime	294
c. 130, §§ 2, 3.	Polygamy	457

GENERAL STATUTES.

c. 11, § 34.	Tax	284
c. 100, § 15.	Trust	504
c. 103, § 41.	Execution	148
c. 118, §§ 89, 103, 122.	Insolvency	254
—— § 103.	"	175, 253, 263
—— § 105.	"	175
—— § 122.	"	175, 253
c. 123, § 104.	Attachment	175
c. 129, § 24.	Demurrer	403
c. 160, § 28.	Threatening to accuse of Crime	294
c. 165, §§ 4, 5.	Polygamy	457

PUBLIC STATUTES.

c. 3, § 3, cl. 12.	Statute	149
—— cl. 16.	"	253
c. 10, § 5.	Sheriff	36
c. 11, §§ 13, 20, cl. 2, 45, 50–54, 69.	Tax	284
—— § 24.	"	444
—— §§ 53, 55, 57, 96, 97.	"	285
c. 22, §§ 1, 3, 6, 7.	Counties	36
—— § 5.	"	37
—— §§ 20, 30, 31.	County Commissioners	36
c. 23, § 15.	County Finances	36

Digitized by Google

c. 32, §§ 11, 18.	Town Clerk	456
c. 49, § 79.	Way	77
—— § 106.	"	349
c. 50, § 1.	Sewer	309
—— §§ 4, 7.	"	26
c. 52, § 16.	Way	77
c. 76, § 1.	Trade-mark	197
—— § 6.	Partnership	462
c. 80, §§ 18–25, 28.	Nuisance	241
c. 100, §§ 6, 7, 16, 19, 21, 23, 28.	Intoxicating Liquor	472
—— §§ 32, 37.	" "	43
c. 102, §§ 11, 19, 27, 28, 32, 115.	" "	472
c. 112, § 39.	Railroad	357
—— §§ 163, 212, 213.	"	133
—— § 212.	"	343
—— § 213.	"	338
c. 116, §§ 35, 36.	Public Charity	514
c. 119, § 139.	Insurance	113
—— § 181.	"	112, 118
c. 120, § 4.	Conveyance	568
c. 122, § 3.	Easement	342
c. 126, § 4.	Conveyance	69
c. 127, § 34.	Will	272
c. 132, §§ 1, 2, 3.	Executor and Administrator	492
c. 136, §§ 9, 11.	Estates of Persons Deceased	492
—— § 19.	" " "	381
—— § 20.	" " "	382
—— §§ 24, 25.	" " "	521
c. 141, § 22.	Trust	504
c. 145, §§ 22, 31.	Marriage	457
—— § 29.	"	456
c. 146, § 11.	Divorce	532
—— §§ 12, 13.	"	533
c. 147, §§ 10, 11.	Married Woman	259
—— §§ 33, 35.	Husband and Wife	530
c. 150, § 3.	Supreme Judicial Court	446
c. 151, § 2, cl. 11.	Equity	128
c. 153, § 6.	Courts	145
—— § 8.	"	537
c. 154, § 59.	Municipal Court	402
c. 155, § 20.	Trial Justice	84
c. 157, §§ 15, 112, 136.	Insolvency	253
—— §§ 15, 36.	"	27
—— §§ 15, 36, 91, 99, 123.	"	295
—— §§ 17, 51, 113.	"	350
—— § 26.	"	561
—— §§ 44, 46.	"	531

Digitized by Google

c. 157, § 46.	Insolvency	178, 351
——— §§ 70, 99.	"	532
——— § 93.	"	255
——— § 96.	"	254
——— § 109.	"	73
——— §§ 112, 115, 136.	"	177
——— § 136.	"	254
c. 161, § 52.	Attachment	533
——— §§ 52, 54, 55, 122, 126.	"	178
c. 162.	Poor Debtor	407
——— § 38.	" "	410
——— §§ 45, 46, 47.	" "	215
——— § 63.	" "	408
c. 163, §§ 12–31.	Bail	408
c. 167, §§ 11, 12, 25, 67.	Demurrer	403
——— § 13.	Answer	268
——— §§ 49–56.	Interrogatory	482
——— § 80.	Evidence	245
c. 169, § 18, cl. 3.	Witness	430
——— §§ 18, 19.	"	432
——— § 22.	"	412
c. 170, § 2.	Grand Juror	455
c. 171, § 20.	Execution	149
——— § 22, 55.	"	80
c. 172, §§ 1, 27.	Levy	149
——— §§ 29, 46.	"	148
c. 175, § 1.	Forcible Entry and Detainer	478
c. 178, §§ 2, 7.	Petition	349
——— §§ 3, 68.	Partition	326
c. 186, §§ 17–25.	Quo Warranto	446
c. 187, §§ 18, 22, 29.	Writ of Review	529
——— § 19.	" "	528
c. 191, §§ 1, 6, 8.	Mechanic's Lien	8
——— § 2.	" "	9
——— § 10.	" "	349
c. 202, § 29.	Threatening to accuse of Crime	293
c. 207, §§ 4, 5.	Polygamy	457
——— § 52.	Cruelty to Animals	245
c. 213, § 9.	Grand Juror	455
c. 214, § 10.	Trial	459
——— § 14.	"	43
c. 220, §§ 23, 26, 27, 72–75.	County Jail	36

STREET.

See ACTION, 4; EVIDENCE, 1; HIGHWAY.

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STREET RAILWAY.

1. A street railway company which, after a storm, is engaged in removing snow from its tracks in a city street, using therefor, by permission of the superintendent of streets, snow ploughs which heap the snow at the side of the tracks, is not liable, in the absence of evidence that the work was done negligently, or by improper methods, or that the snow was unnecessarily piled up in the street and not seasonably removed, for injuries occasioned to a traveller on the sidewalk who was struck by a horse belonging to a third person, which, on entering the street where the tracks were from a side street, ran into the pile of snow, tipped over the sleigh to which it was attached, escaped from the control of the driver, and ran away. *Ovington* v. *Lowell & Suburban Street Railway*, 440.
2. The Lowell Horse Railroad Company, which, under an ordinance of the city of Lowell, was forbidden under certain conditions to use snow ploughs on its tracks in that city, or to remove snow therefrom, without consent first being obtained of the mayor, or of the superintendent or chairman of the committee on streets, and the Lowell and Dracut Street Railway Company, having under the provisions of St. 1890, c. 163, been consolidated into the Lowell and Suburban Street Railway Company, the consolidated company, though subject, under the operation of the statute, to the provisions of the ordinance, may, with the consent of the superintendent of streets, lawfully remove snow from its tracks in Lowell by means of ploughs or otherwise. *Ibid.*

See ACTION, 6; EVIDENCE, 1, 17; PARENT AND CHILD; PASSENGER, 3.

SUBPŒNA.

See EQUITY, 7.

SUFFOLK COUNTY.

See BOSTON.

SUMMARY PROCESS FOR RECOVERY OF LAND.

The lessee under a written lease of the purchaser at an execution sale of lands may, after written notice to the tenant at will of the original owner to quit and deliver up the premises, maintain an action on the Pub. Sts. c. 175, against him to recover possession thereof without showing forcible entry or forcible detainer; and it is immaterial that the defendant never held under nor attorned to the plaintiff. *Marsters* v. *Cling*, 477.

SUPERIOR COURT.

1. The Superior Court has no general supervisory authority over the proceedings of courts of insolvency such as is given to the Supreme Judicial

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Court by Pub. Sts. c. 157, § 15; and, while in certain cases the right of appeal to the Superior Court is given, as in Pub. Sts. c. 157, §§ 36, 91, there are no provisions of statute which give this right in the matter of granting an allowance to insolvent debtors. *Kaffenburg* v. *Assner*, 295.

2. At the trial of an action in the Superior Court, the judge may properly allow the plaintiff to testify that, at the former trial of the case in the Municipal Court, a witness, who was also a witness at the trial in the Superior Court, was present of his own accord, and without a request from the plaintiff. *Robinson* v. *Cutter*, 377.

See AMENDMENT; COSTS; EQUITY, 10; EXCEPTIONS; GRADE CROSSING, 2; INSOLVENT DEBTOR, 6; JURISDICTION; TRIAL, 8.

SUPREME JUDICIAL COURT.

See EQUITY, 8, 10; ESTATES OF PERSONS DECEASED, 4; EXCEPTIONS; SUPERIOR COURT, 1; TOWN, 3, 4; TRIAL, 1, 2.

SURPLUSAGE.

See ADULTERY, 1; INDICTMENT, 2.

SURVIVORSHIP.

See DEVISE AND LEGACY, 5.

TAX.

1. In valuing the real property of a manufacturing corporation for taxation, when the land must be valued exclusively of the buildings and the buildings exclusively of the land, it is erroneous to value the land as if the buildings were removed from it and then to value the buildings as if they were to remain upon it, if the sum of the values thus obtained is greater than the fair cash value of the land and buildings taken together in the condition they were in at the time to which the valuation relates. *Tremont & Suffolk Mills* v. *Lowell*, 283.

2. Partners whose principal place of business is in the city of B. cannot be taxed in the town of C. as the place where their business is carried on, within the meaning of Pub. Sts. c. 11, § 24, from the fact that, by a contract with the superintendent of the State Reformatory in C., they transact business there wholly incident to work done by the State and in a place under its exclusive control. *Cloutman* v. *Concord*, 444.

See REDEMPTION.

TENANT AT WILL.

See SUMMARY PROCESS FOR RECOVERY OF LAND.

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TENDER.

If an agent of the mortgagor of personal property goes to the mortgagee's place of business for the purpose of paying to him the sum necessary to discharge the debt under St. 1888, c. 388, having with him sufficient money for that purpose, and being ready and willing to pay the same, and makes known his purpose and his readiness and willingness so to pay to the mortgagee, and is prevented from making an actual and formal tender of the proper sum only by the mortgagee's refusal to accept it and his assertion that a larger amount is due, and his withdrawal from further talk and from the immediate presence of the agent for the purpose of preventing the making of the tender, the acts of the agent are equivalent to a tender, and have the effect to discharge the lien of the mortgage. *Schayer* v. *Commonwealth Loan Co.* 322.

See CONTRACT, 5; CORPORATION, 1; REDEMPTION.

THREAT.

A threat to arrest a person in a civil proceeding cannot be held to be a threat to injure the person of another, within the meaning of Pub. Sts. c. 202, § 29. *Commonwealth* v. *Mosby*, 291.

TITLE.

See DAMAGES, 2; MORTGAGE, 2; SALE.

TORTS.

See ACTION, 4–7; DECEIT; EMPLOYERS' LIABILITY ACT; EVIDENCE, 3, 12–14, 16, 17, 23, 30–33; EXCEPTIONS, 8, 10; GRADE CROSSING, 1; HIGHWAY; INFANT; LIBEL; LIVERY STABLE; MALICIOUS PROSECUTION; MASTER AND SERVANT; NEGLIGENCE; PASSENGER, 2, 3; STREET RAILWAY; TRESPASS; TROVER; VERDICT, 1; WAY, 1, 8.

TOWN.

1. The bringing of an action by a town upon an agreement, taken by its selectmen from the owner of land therein through which a common drain is laid, for reimbursement of the cost to the town of enlarging the drain on his premises, is sufficient evidence of acceptance of the agreement, and of a ratification of the act of the selectmen in taking it. *Melrose* v. *Hiland*, 303.
2. The St. 1891, c. 370, § 1, authorized any city or town to purchase and maintain within its limits a plant for the manufacture or distribution of gas or electricity. Section 3 provided as follows: "No town shall exercise the authority conferred in section one until after a vote that it is expedient to exercise such authority shall have been passed by a vote of not less than two thirds of the voters present and voting at each of two legal town

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meetings duly called for the purpose, of which meetings the second shall be held at an interval of not less than two nor more than thirteen months after the first." A warrant for a town meeting contained the following article: "To see if the town will vote to exercise the authority conferred in section one" of the statute, "or do or act anything respecting the same." Under this article the town voted "that the town do exercise the authority conferred in section one" of the statute, more than two thirds of the voters present and voting having voted in the affirmative. Another meeting was held more than two months later, at which there was a vote under an article in the same form as the other, and the language of the vote was the same as that at the former meeting, except that the words "that it is expedient for the town . . . to exercise the authority" were used instead of the words "that the town do exercise the authority." At this meeting more than two thirds of the voters present and voting voted in the affirmamative. *Held*, that, considering the whole proceedings together, the first vote taken by the town was sufficient under the statute. *Hudson Electric Light Co.* v. *Hudson*, 346.

3. After a town has voted at two separate town meetings called as required by St. 1891, c. 370, § 3, that it is expedient to exercise the authority conferred by § 1 to purchase and maintain a plant for the manufacture or distribution of gas or electricity, after the schedule required by § 13 has been filed with the town clerk, and after a petition has been filed in this court under that section, to enforce the obligation of the town to purchase the petitioner's plant, the town cannot, by a subsequent vote, relieve itself from its liability so to purchase such plant. *Ibid.*

4. The filing in the clerk's office of this court within the time required by St. 1891, c. 370, § 13, of a petition to enforce the obligation of a town to purchase an electric light plant, is an application by petition to this court for "an adjudication between the parties," within the statute. *Ibid.*

See DRAIN; HIGHWAY, 1; SEWER, 2, 3; TAX, 2.

TRADEMARK.

1. A word which might become a valid trademark when applied to an unpatented article may not be so when applied to a patented article. *Dover Stamping Co.* v. *Fellows*, 191.

2. Where one who has a patented article gives to it and puts upon it a name, and calls it by that name and by no other, and it becomes known to the trade and to the public exclusively by such name, then, as a general rule, the right to the exclusive use of the name ceases with the termination of the exclusive right to make and sell the article. *Ibid.*

3. A person who has used a name as descriptive of a patented article, but in which he has no trademark, is not entitled, after the expiration of the patent, to protection under Pub. Sts. c. 76, § 1, providing that trademarks are not to be used without the consent of the owner. *Ibid.*

4. If a person has used a name as descriptive of a patented article, and not as a trademark, he cannot maintain a bill in equity, after the expiration

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of the patent, to restrain the use of the name by another person upon an article made by the latter, on the ground that he is injuring the plaintiff by unfair competition, merely by showing that the defendant is making and selling an article similar in kind and under the same name as that of the plaintiff. *Dover Stamping Co.* v. *Fellows*, 191.

TRANSFER OF STOCK.

See CORPORATION, 1.

TRAVELLER.

See HIGHWAY; NEGLIGENCE, 4, 5; STREET RAILWAY, 1.

TRESPASS.

A. made a written contract with a city for the construction of a sewer in a certain street. The contract provided that the city should furnish the brick to A. The city accordingly made a contract with B. to supply the brick, which was to be delivered "upon the work on the line of the sewer." B. unloaded the brick on C.'s wharf and carted them across C.'s land, which abutted on the street in question, and delivered them to the city at the place agreed upon. There was no arrangement between B. and any one representing the city that B. should use C.'s wharf or cross his land in delivering the brick. *Held*, in an action by C. against the city for trespass, that the city was not responsible for B.'s acts. *Harding* v. *Boston*, 14.

See INFANT, 2; NEGLIGENCE, 1.

TRIAL.

1. At a criminal trial the prosecution, having sufficiently designated the time and place, inquired of one of its witnesses touching a certain conversation in which he had previously made statements on material matters inconsistent with his testimony, and subsequently sought to contradict him by the testimony of another witness, as is allowed by Pub. Sts. c. 169, § 22. *Held*, that it was doubtful whether the objection that the witnesses testified to different conversations, not having been taken at the trial, was open at the argument in this court. *Held*, *also*, that, if open, the same time and place for the conversation having been fixed by both witnesses, the evidence was competent as affecting the credit of the first witness. *Commonwealth* v. *Smith*, 411.
2. At the trial of an indictment for a conspiracy to solicit applicants for licenses to sell intoxicating liquors in a certain city to bribe such of the defendants as were aldermen thereof for the purpose of influencing their action on the granting of the licenses, an alderman not under indictment was properly allowed to testify that at a meeting of the mayor and aldermen, and just before acting on the licenses, the aldermen went into a com-

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mittee room where they had a general conversation about the granting of the licenses; that the witness said that he wanted all the licenses to be granted, but would take no part in granting a portion of them only because that would look as if the aldermen were putting up a bid for the rest, but that the indicted aldermen wanted to grant a part of them only; and the objection that it did not appear that any one heard what such alderman said in the committee room, not having been taken at the trial, is not open at the argument in this court. *Commonwealth* v. *Smith*, 411.

3. At the trial of an indictment for conspiracy to solicit bribes, a witness for the defence who denies his agency for one of the defendants in soliciting bribes may, such agency being material, be contradicted by the prosecution for the purpose of affecting his credit. *Ibid.*

4. If, at a criminal trial, a government witness testifies to a conversation at a certain time and place between himself and the defendant, the latter cannot, after a denial of such a conversation, put in evidence another conversation between them upon the same subject at another time and place. *Ibid.*

5. At the trial of a complaint for keeping and maintaining a liquor nuisance three police officers testified to finding four men in the defendant's kitchen, and in his presence, drinking liquor, which they took from the men under their protest that the liquor was theirs and that they had paid for it. The counsel for the defendant interrupted the district attorney in his argument that the evidence was true from the failure of the defendant to call the men as witnesses, and that it would not be safe for the government to summon them, as they were friends of the defendant and would favor him, on the ground that, until it appeared that the men were under the control of the defendant or could be produced by him, and that they knew about the case, no inference could be drawn against him, and that the government was as much under obligation to produce the men as the defendant. The judge declined to stop the district attorney in his argument. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *McCabe*, 98.

6. At the trial of a criminal case the judge instructed the jury that, if a statement was made in the hearing and presence of a person which affected his rights or was criminating to him and he remained silent, such silence was tantamount to an admission of the truth of the facts stated, provided the same was heard and understood by such person, and he was not in custody or under restraint, but at liberty to reply or explain, and provided such statement was of such a nature, and made under such circumstances and by such persons, as naturally to call for a reply. *Held*, that if, instead of saying that silence was "tantamount" to an admission, the judge had said that it was in the nature of an admission, the instructions would have been strictly accurate, but that the inaccuracy, if any, was eliminated by the jury being told that if they found the facts as contended by the government "they would give to the circumstance such weight and significance as they thought it entitled to." *Ibid.*

7. At the trial of a criminal case the judge instructed the jury that, if there was evidence to rebut that of the government which might be furnished by witnesses other than the defendant, and if the evidence against the defendant was such that he would be expected to call them, his failure so to

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do would be a circumstance to be considered and given such weight and significance by the jury as they thought it entitled to, and from which they might infer, if they thought the inference warranted and a reasonable one, that such witnesses would testify unfavorably to the defendant; but that unless it appeared that such witnesses were within the defendant's control, and could be procured by him, the jury were to give no significance to his failure to call them. The judge declined the defendant's request to give the further instruction that, if it did not appear that the witnesses were under the defendant's control, the government was under the same obligation to produce the witnesses as the defendant, and that their non-production by the government was to be considered as much against it as against the defendant. *Held*, that the defendant had no ground of exception, especially as there were circumstances from which the jury might well have inferred that the witnesses were under the defendant's control and could be procured by him. *Commonwealth* v. *McCabe*, 98.

8. The docket of the Superior Court showed that the defendant in an action duly claimed a trial by jury, but the clerk of the court by mistake put the case upon the jury waived list. About a month before the case was reached for trial on that list, the defendant's counsel made some search for, but was unable to find, the notice that the defendant claimed a trial by jury, and believed that his clerk had not given the notice. He made no motion to transfer the case to the list of cases for trial by jury, but proceeded to a trial without a jury. After the trial, and before the finding of the judge had been formally made and entered, the notice was found among the files of the case; and thereupon the defendant asked the judge to transfer the case to the list for trial by jury. The judge refused so to do, and found for the plaintiff. *Held*, that the defendant had no ground of exception. *Walcott* v. *O'Connor*, 21.

See ADULTERY, 2; CONSTITUTIONAL LAW, 1; DAMAGES, 1; EVIDENCE, 2, 6; EXCEPTIONS, 2–6, 9, 10; POOR DEBTOR, 1, 3, 4; SUPERIOR COURT, 2; VERDICT, 2.

TRIAL JUSTICE.

See POOR DEBTOR, 3, 4.

TROVER.

1. A. delivered a desk to B. under an agreement for purchase on the instalment plan, by which A. had the immediate right of possession on B.'s failure to make the specified payments. B. failed to make these payments. C. attached the desk in a suit against B., and told the officer to put the desk "where they would not know where it was." C. had also said that A. had been trying to get a desk, but he had got it put away where A. could not find it. *Held*, that, upon these facts, A. could maintain an action for the conversion of the desk by C. without proof of a demand. *Robinson* v. *Way*, 212.

2. It is not necessary, in order to maintain an action of trover, that the de-

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fendant should have it in his power, at the time the action is brought, to give up property which he previously has converted to his own use. *Robinson* v. *Way*, 212.

3. In an action by a mortgagee against an officer for the conversion of the mortgaged property, the plaintiff must recover, if at all, upon the strength of his own title, and it is competent for the defendant to introduce evidence to show that the plaintiff had no title to a portion of the property. *Baker* v. *Seavey*, 522.
4. In an action by a mortgagee of personal property against an officer for the conversion of the mortgaged property, which was attached by him in an action against the mortgagor, the defendant may show that certain articles claimed by the plaintiff were not attached. *Ibid.*

See ACTION, 1, 2; DOWER; INSOLVENT DEBTOR, 7.

TRUST AND TRUSTEE.

1. The provisions of the Pub. Sts. c. 141, § 22, as to selling and conveying in certain cases property held in trust by minors, lunatics, etc., are not applicable to a person who has agreed to purchase land in this Commonwealth, and this court has no power under the statute to compel him to accept a conveyance where it cannot bind him personally by its decree. *Merrill* v. *Beckwith*, 503.
2. A provision in a will giving an estate to trustees in trust to be conveyed in fee simple to A. and his descendants, together with the income of a fund also given in trust, the income to be used by A., his heirs and assigns, exclusively for the purpose of keeping the estate as well as the testator's cemetery lot and monument always in repair, creates, so far as it is intended for the purpose of keeping the estate in repair a private perpetual trust, and the estate, having been conveyed to A., becomes absolutely his property, and the fund also becomes absolutely his property so far as it is intended to be used in keeping the estate in repair; but the trust to keep the burial lot and monument always in repair is a good perpetual trust under our statutes, and, it being conceded that a certain sum is sufficient for the purpose, the trustees should retain in their hands that sum, or deposit it with the treasurer of the city, the income thereof to be used to keep the burial lot and monument always in good order. *Bartlett, petitioner*, 509.
3. A devise of real estate to trustees to be cut up into "smaller lots and sold for pleasant homes," and of two wharves to be sold or to be let to the persons who should build on the lots, does not create a charitable trust, but merely a trust for sale of real estate. *Ibid.*
4. A bequest of money in trust, "the income only to be paid semi-annually to my nephew A. and his heirs," is an attempt to create a private perpetual trust, and the money is to be paid to A. absolutely. *Ibid.*
5. The provisions of the paragraphs in the will which have been numbered for convenience from fifty to fifty-two, directing, among other things, the payment of the average annual income in the place of interest to certain

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institutions, relate only to those institutions mentioned in the forty-eighth and forty-ninth paragraphs, that conclusion being justified by the phraseology of the will and by the aid derived from the examination of a photographic copy of it. *Bartlett, petitioner*, 589.

See DEVISE AND LEGACY, 2–5; INTEREST, 2; MORTGAGE; PUBLIC CHARITY, 3–8; REMAINDER.

TRUSTEE PROCESS.

One who has been summoned as trustee in another jurisdiction is not liable to be held in an action subsequently brought against him by his creditor here; but this defence is not available, whether pleaded in bar or abatement, if his liability elsewhere has wholly ceased without payment by himself. *Craig Silver Co.* v. *Smith*, 262.

USAGE.

See EVIDENCE, 12.

VARIANCE.

See EXECUTION, 7.

VENDOR AND PURCHASER.

See CONTRACT, 5–7; PROMISSORY NOTE, 2; REDEMPTION.

VERDICT.

1. In an action of tort against several defendants, where no question of the liability of the defendants among themselves is raised by the pleadings, tried or argued, an order of the court directing a verdict in favor of one of them is not subject to exception by the others. *Warren* v. *Boston & Maine Railroad*, 484.
2. While it is a right of the defendant indicted for a felony to be present when the verdict is rendered as well as during the earlier parts of the trial, and while it is irregular to begin the trial without his presence, yet if he is on bail and is present at the commencement of the trial, and afterwards voluntarily departs without leave, and is absent when the verdict is returned, he may be defaulted and a verdict which will be binding upon him may be taken in his absence. *Commonwealth* v. *McCarthy*, 458.

See NEGLIGENCE, 4; NEW TRIAL, 2, 3.

VESTED INTEREST.

See DEVISE AND LEGACY, 2, 4, 5; REMAINDER.

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VOLUNTEER.

See ACTION, 7.

WAIVER.

If A. delivers property to B. under an agreement for purchase on the instalment plan, by which A. has the immediate right of possession on B.'s failure to make the specified payments, and the property is attached and taken from B.'s possession by C. in a suit against B., who thereupon declines to make any payments until the property is returned to him, and A. then replevies and returns the property to him, this does not show a waiver of A.'s right of possession for non-payment by B. *Robinson* v. *Way*, 212.

See ABATEMENT; CONTRACT, 6; EVIDENCE, 22; INTERROGATORIES TO ADVERSE PARTY; LANDLORD AND TENANT, 2, PASSENGER, 1; SALE, 2; VERDICT, 2.

WARRANTY.

See EXPERT; INSURANCE.

WATER WORKS.

See EMINENT DOMAIN.

WAY.

1. In an action against a railroad corporation for causing the death of a person at a crossing over its railroad, in order to show that the crossing has become a public way by prescription it is necessary for the plaintiff to prove an adverse use continued without interruption for twenty years, and an acquiescence in such use by the defendant. *Sprow* v. *Boston & Albany Railroad*, 330.
2. The fact that there is a private way across a railroad by reservation does not prevent the public from gaining a right to use the way by prescription. *Ibid.*
3. From merely using what is open to use, without more, no presumption arises that the use is adverse. *Ibid.*
4. In determining whether the unauthorized use of a private way is under a claim of right, the final test is, not whether it is greater or less in amount than the rightful private use, but whether it is of such a character as to show the assertion or assumption of a right so to use the way, or a use under the belief that such use is a matter of public right. *Ibid.*
5. The mere posting up of a sign, "Private way," by a railroad corporation, at the crossing of its railroad by a way, is not to be deemed a prohibition of passage by others than those entitled as of right to pass along the way. *Ibid.*

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6. In determining whether there was such acquiescence in the use of a way as is necessary in order to establish a public right, mere permission is not enough, but there must be something to show that such permission was accompanied with knowledge or reason to believe that the way was used under a claim of a public right. *Sprow* v. *Boston & Albany Railroad*, 330.

7. A way across a railroad was reserved in the original deed of the premises to the railroad corporation, given in 1834 by J., who owned a large tract of land on the south side of the railroad. The way was never laid out as a public way, but it led from a highway on the north of the railroad to J.'s land on the south; and the land has since been used for buildings, twenty or thirty houses having been erected upon it, and in 1863 the name of G. Avenue was given to the way, the use of which had much increased, from one hundred to one hundred and fifty persons passing over it daily. It had never been repaired by the city, or treated by it as a public way, on either side of the railroad. Southerly of the railroad there was a steep ascent, which was not kept in such repair as would be expected if it were a charge upon the city. The way on that side passed through an opening, less than fourteen feet wide in the fence on the side of the railroad. The general use of the avenue was mainly for the houses situated upon it, but incidentally it was also used by persons going through the avenue to reach some point beyond. Anybody used it who wished so to do, and with teams and vehicles of various descriptions. At the crossing the railroad corporation had put up within its premises a sign, "Dangerous passing. This is a private way." On the outside of the fence the city had also put up a sign, "Not a public way. Dangerous." There was no sign-board such as is required by statute where a public way and a railroad cross each other on a level. *Held*, in an action against the railroad corporation for causing the death of a person at the crossing, that the evidence was not sufficient to warrant a finding that the crossing had become a public way by prescription. *Ibid.*

8. A young woman, possessing good eyesight and hearing, who had lived for several months in a house about fifty feet distant from the tracks of a railroad, was accustomed to cross over them frequently by a private way, which was used quite generally by the public, and which passed through an opening in the fence at the side of the railroad. An approaching train could not be seen until this opening had been reached, and then could be seen a long distance. She left her house about the time when an express train was due at the crossing, on a stormy day, and hurried along the way, intending to take an electric car which was about to start from a station on the opposite side of the tracks. She passed through the opening in the fence and entered upon the tracks, having her umbrella raised, and, walking rapidly, and without looking to see if a train was coming, attempted to cross the tracks, when she was struck by the locomotive engine of the express train and killed. *Held*, in an action against the railroad corporation for causing her death, that the evidence showed that she was not in the exercise of due diligence. *Ibid.*

9. A., who owned land upon a public street, erected thereon a long wooden

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block of tenements facing on the street, and, in the rear and south of the block, several houses, and laid out a driveway running east and west between the rear of the block and the front of the houses, and also passageways at the east and west ends of the block leading from the driveway to the street. These ways were intended by A. as passageways or driveways to and from the street, and were in actual use by owners, tenants, and others having occasion so to use them, when A. conveyed one of the houses to B., by a deed which bounded the land in part as "running north . . . to a driveway, thence easterly on said driveway," and which also contained the following reservation: "Reserving that the said driveway between said houses as now laid out shall remain open and common to all parties having right to enter therein." B., when he took his deed, gave back to A. a mortgage which contained the same description and reservation as in the deed. A. then conveyed the block above mentioned to C. by a deed describing the land in part as "running south . . . to a driveway running in rear of said lot to be conveyed; thence turning by said driveway east . . . to a driveway, . . . reserving hereby all rights of passage as now laid out in the driveways and passageways connected with said premises, and the same are never to be closed or obstructed while said premises remain as now laid out, except the parties now or hereafter owning the surrounding premises mutually agree to alter and rearrange the same." The mortgage given by B. to A. was subsequently foreclosed by D., the son of, and acting as agent for A., who made to D. a mortgagee's deed, under the power of sale contained in the mortgage, of the entire premises described in B.'s deed; and afterwards D., by A.'s direction, conveyed a portion of the premises to his brother, and another portion to his father, retaining the balance in himself. *Held*, that it would seem that B. took to the centre of the driveway in fee, with a right of way over the other half, the half belonging to him being subject to a similar right of way on the part of all persons having the right to enter upon the driveway; but that, if this were not so, there passed, as appurtenant to the premises conveyed to B., an implied right to use the ways, and that this appertained to every portion of the premises so conveyed. *Held*, *also*, that a subsequent grantee of C.'s land had no right, under the reservation in C.'s deed, as against D., to close up the driveway in the rear and the passageway at one end of the block without D.'s consent. *Boland* v. *St. John's Schools*, 229.

See DRAIN, 1, 2; EQUITY, 2; EVIDENCE, 18; HIGHWAY; SEWER, 2, 3.

WIDOW.

See DEVISE AND LEGACY, 2, 3, 5; DOWER.

WILL.

An action was brought on an oral agreement, alleged to have been made in Maine, in 1890, by A., the defendant's testator, to the effect that, if the

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plaintiff would leave Maine and take care of A., the latter would leave the plaintiff all his property at his death and would also put four thousand dollars into a house which the plaintiff should have; and evidence was introduced at the trial tending to prove the agreement as alleged. *Held*, that St. 1888, c. 372, which provides that an agreement to make a will or give a legacy or devise by will shall not be binding unless in writing, was a bar to the action, and that the fact that the plaintiff had furnished the stipulated consideration did not prevent the application of the statute. *Emery* v. *Burbank*, 326.

See CONTRACT, 8; DEVISE AND LEGACY; EQUITY, 1; ESTATES OF PERSONS DECEASED; INTEREST; NAME, 2; REMAINDER; TRUST AND TRUSTEE, 2–5.

WITNESS.

1. A person under indictment, who at his trial testifies in his own behalf, may be asked on cross-examination, for the purpose of affecting his credit whether, when a witness before the grand jury investigating the same matter, he did not decline to testify on the ground that he might criminate himself. *Commonwealth* v. *Smith*, 411.
2. Evidence that a witness of the adverse party had made statements out of court inconsistent with his testimony is admissible without first calling the attention of such witness, when testifying, to the time, place, or circumstances of the alleged contradictory statements. *Carville* v. *Westford*, 544.

See ESTATES OF PERSONS DECEASED, 3; EVIDENCE, 14, 23, 28–33; EXPERT; GRAND JURY, 2, 3; SUPERIOR COURT, 2; TRIAL, 1–5, 7.

WORDS.

"Adverse use." See *Sprow* v. *Boston & Albany Railroad*, 330, 339.
"All." See *Palmer* v. *Jordan*, 350, 352.
"All civil actions and proceedings." See *Walker* v. *Cooke*, 401, 402.
"All his right and interest in the name." See *Holbrook* v. *Nesbitt*, 120, 126.
"All liability of charterers under the agreement." See *Marwick* v. *Rogers*, 50, 61.
"All questions, whether of demurrage or otherwise." See *Marwick* v. *Rogers*, 50, 61.
"All the right in equity." See *Holmes* v. *Jordan*, 147, 149.
"Apply by petition." See *Hudson Electric Light Co.* v. *Hudson*, 346, 349.
"As I shall have grandchildren at my decease." See *Richardson* v. *Willis*, 130, 131.
"As manufactured prior to the filing of the bill and to the hearing of the cause." See *Stratton* v. *Seaverns*, 73, 76.
"Assigns." See *Kendall* v. *Clapp*, 69.
"Assume." See *Martin* v. *Bowker*, 461, 462.

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"As would be required to pay these legacies in full, not exceeding five years." See *Bartlett, petitioner*, 509, 520.
"Attended." See *White* v. *Provident Life Assurance Society*, 108, 116.
"Building." See *Reardon* v. *Murphy*, 501.
"Cause for which a new trial may by law be granted." See *Ellis* v. *Ginsburg*, 143, 146.
"Circumstantial or presumptive evidence." See *Commonwealth* v. *Hayden*, 453, 457.
"Consent." See *Borden* v. *Mercer*, 7, 8.
"Continue to carry on the same business." See *Holbrook* v. *Nesbitt*, 120, 124.
"Continue to use in his business." See *Martin* v. *Bowker*, 461, 462.
"Debt." See *Draper* v. *Hollings*, 127, 129.
"Distributive share." See *Taft* v. *Taft*, 467, 468.
"Dover." See *Dover Stamping Co.* v. *Fellows*, 191.
"Equity." See *Holmes* v. *Jordan*, 147, 149.
"Established." See *Draper* v. *Hollings*, 127, 129.
"For examination before some magistrate authorized to act." See *Boston Wall Paper Co.* v. *Mullen*, 20.
"For her sole use and comfort during her natural life." See *Kendall* v. *Clapp*, 69, 70.
"Formerly with." See *Martin* v. *Bowker*, 461, 462.
"For the erection of." See *Boston Electric Co.* v. *Cambridge*, 64, 65.
"Fraudulent conveyance." See *Steel Edge Stamping & Retinning Co.* v. *Manchester Savings Bank*, 252, 254.
"Full and appropriate instructions." See *Commonwealth* v. *Sheehan*, 170.
"Full and fair cash value." See *Tremont & Suffolk Mills* v. *Lowell*, 283, 284.
"Granting and signing of licenses." See *Sullivan* v. *Borden*, 470, 473.
"Had full knowledge that the assignees were working in good faith." See *Steel Edge Stamping & Retinning Co.* v. *Manchester Savings Bank*, 252, 254.
"Heirs." See *Perkins* v. *Stearns*, 247, 251.
"Heirs and assigns." See *Kendall* v. *Clapp*, 69.
"In person." See *Commonwealth* v. *Connelly*, 539, 542.
"It is expedient." See *Hudson Electric Light Co.* v. *Hudson*, 346, 348.
"Keep." See *Commonwealth* v. *Intoxicating Liquors*, 42, 44.
"Lands." See *Holmes* v. *Jordan*, 147, 149.
"Late." See *Holbrook* v. *Nesbitt*, 120, 124.
"Legal representatives." See *Eager* v. *Whitney*, 463, 466.
"Make or suffer." See *Miller* v. *Prescott*, 12.
"May by law be granted." See *Ellis* v. *Ginsburg*, 143, 146.
"Mesne process." See *Place* v. *Washburn*, 530, 531.
"Misrepresentation." See *White* v. *Provident Savings Life Assurance Society*, 108, 111; *Levie* v. *Metropolitan Life Ins. Co.* 117.
"Mortgage of real estate." See *Harriman* v. *Woburn Electric Light Co.* 85.
"My other children." See *Lee* v. *Welch*, 312, 313.
"No agreement." See *Emery* v. *Burbank*, 326, 328.

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"Notifications." See *Holmes* v. *Jordan*, 147, 149.
"Of." See *Holbrook* v. *Nesbitt*, 120, 125.
"Oleomargarine." See *Commonwealth* v. *Kelly*, 169.
"Or." See *Robinson* v. *Way*, 212, 213.
"Or keeper." See *Commonwealth* v. *Intoxicating Liquors*, 42, 43.
"Passenger." See *Jones* v. *Boston & Maine Railroad*, 245.
"Person." See *Steel Edge Stamping & Retinning Co.* v. *Manchester Savings Bank*, 252, 253.
"Place of business." See *Cloutman* v. *Concord*, 444, 445.
"Private way." See *Sprow* v. *Boston & Albany Railroad*, 330.
"Recorded." See *Harriman* v. *Woburn Electric Light Co.* 85, 87.
"Reduce the exceptions to writing in a summary mode." See *Ryder* v. *Jenkins*, 536, 538.
"Signed by the party whose executor or administrator is sought to be charged." See *Emery* v. *Burbank*, 326, 329.
"Some public place." See *Holmes* v. *Jordan*, 147, 149.
"Subject to the right of the clients." See *Holbrook* v. *Nesbitt*, 120, 126.
"Successor." See *Martin* v. *Bowker*, 461, 462.
"Suffer." See *Miller* v. *Prescott*, 12, 13.
"Superintendence." See *McPhee* v. *Scully*, 216; *Carroll* v. *Willcutt*, 221; *Shea* v. *Wellington*, 364.
"Surrounding premises." See *Boland* v. *St. John's Schools*, 229, 238.
"Tantamount." See *Commonwealth* v. *McCabe*, 98, 103.
"Threat to injure the person." See *Commonwealth* v. *Mosby*, 291.
"Tortious act." See *Warren* v. *Boston & Maine Railroad*, 484, 487.
"To the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times." See *Harding* v. *Boston*, 14, 18.
"True account of the amount." See *Borden* v. *Mercer*, 7, 8.
"Upon the work on the line of the sewer." See *Harding* v. *Boston*, 14, 19.
"Ways, works, or machinery." See *Carroll* v. *Willcutt*, 221; *Shea* v. *Wellington*, 364, 369, 370.
"With all just credits given." See *Borden* v. *Mercer*, 7, 8.
"Within one year from this date." See *Usher* v. *Raymond Skate Co.* 1, 4.
"Without conscious suffering." See *Mears* v. *Boston & Maine Railroad*, 150.

WRIT OF ENTRY.

See EXECUTION, 7; REDEMPTION.

WRIT OF REVIEW.

A writ of review brought ten months after leave of court obtained to bring it is not seasonably prosecuted, and will be dismissed on motion, although, during the greater part of that period, the plaintiff in review, who had left the Commonwealth on business, was detained abroad by illness. *Di Filippo* v. *Allen*, 528.

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WRITS.

See Constitutional Law, 1; Execution, 7; Railroad Commissioners; Writ of Review.

WRITTEN INSTRUMENTS.

See Chattel Mortgage; Contract; Devise and Legacy; Estates of Persons Deceased, 3, 4; Evidence, 1-4; Mortgage; Promissory Note; Sale; Way, 9; Will.

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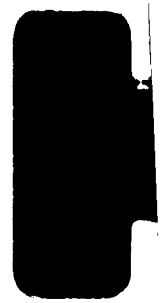

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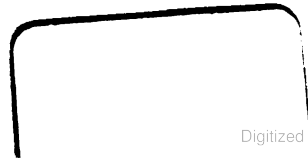

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